SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 773.

SUPREME LODGE KNIGHTS OF PYTHIAS, PLAINTIFF IN ERROR,

vs.

JOSEPHINE A. WEBBER.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED DECEMBER 28, 1914.

(17,217.)

(17,217.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 632.

SUPREME LODGE KNIGHTS OF PYTHIAS, PLAINTIFF IN ERROR,

vs.

JOSEPHINE R. WITHERS.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA, 88:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the 5th circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court, before you or some of you, between the Supreme Lodge Knights of Pythias, a corporation, and Josephine R. Withers, a manifest error hath happened, to the great damage of the said Supreme Lodge Knights of Pythias, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the
Supreme Court of the United States.

b [Endorsed:] No. 666. Supreme Lodge Knights of Pythias *v.* Josephine R. Withers. Writ of error. Filed Nov. 15, 1898. J. M. McKee, clerk.

c UNITED STATES OF AMERICA, 88:

To Josephine R. Withers, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the 5th circuit, wherein The Supreme Lodge Knights of Pythias, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be

corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this eighth day of November, in the year of our Lord one thousand eight hundred and ninety-eight.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

d I hereby accept due and legal service of the within citation and waive any other or further notice thereof.
Nov. 19th, 1898.

ED. DE GRAFFENRIED,
Att'y of Josephine R. Withers.

THE STATE OF ALABAMA, }
Hale County. }

I, Thomas E. Knight, a notary public in and for Hale county, Alabama, do hereby certify that on this day Ed. de Graffenried, whose name is signed to the foregoing acceptance of service, came before me and acknowledged before me that he accepted the said service and signed his name thereto on the day the same bears date of his own free will and accord.

Witness my hand and seal this November 19th, 1898.

[Seal of Thos. E. Knight, Notary Public, Hale County, Ala.]

THOMAS E. KNIGHT,
Notary Public.

e UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of November, 1897, and held in the court-room of said court, in the city of New Orleans, before the Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit; the Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS, Plaintiff in Error, }
vs.
JOSEPHINE R. WITHERS, Defendant in Error. }

Be it remembered that heretofore, to wit, on the 29th day of December, 1897, a transcript of the record of the above-styled cause from the circuit court of the United States for the middle district of Alabama was filed in the office of the clerk of said United States circuit court of appeals and is in the words and figures following to wit:

1 At a term of the circuit court of the United States for the middle district of Alabama, begun and held at Montgomery, Alabama, on the first Monday in May, it being the 3rd day of said month, in the year of our Lord one thousand eight hundred and ninety-seven—present and presiding, Honorable John Bruce, United States district judge for the middle and northern districts of Alabama, sitting as circuit judge—the following proceedings were had:

JOSEPHINE R. WITHERS
vs.
THE SUPREME LODGE OF THE KNIGHTS OF PYTHIAS. } No. 780.

Transcript from the circuit court of Hale Co., Ala.

THE STATE OF ALABAMA, }
Hale County. }

Circuit Court.

To any sheriff of the State of Alabama, Greeting:

You are hereby commanded to summon the Supreme Lodge of the Knights of Pythias, a corporation doing business in the State of Alabama, to appear at the next term of the circuit court to be held for said county, at the place of holding the same, then and there to answer the complaint of Josephine R. Withers.

Witness my hand this 3rd day of M'ch, 1896.

P. F. OWENS, *Clerk.*

2 *Complaint.*

JOSEPHINE R. WITHERS, Plaintiff,
vs.
THE SUPREME LODGE KNIGHTS OF PYTHIAS, Defendant. }

The plaintiff claims of the defendant, The Supreme Lodge Knights of Pythias, a corporation duly organized and existing under and by virtue of an act of Congress of the United States, approved by the President of the United States on the 29th day of June, 1894, and which is doing business in Hale county, Alabama, the sum of three thousand dollars due by a certain instrument or policy of insurance upon the life of one R. W. Withers, and which is in words and figures as follows, to wit:

No. 11072. $3,000.

Certificate of Membership, Fourth Class.

Endowment rank of the order of Knights of Pythias.

This certifies that Brother Robert W. Withers received the endowment rank of the order of Knights of Pythias in section No. 432 on March the 2nd, 1883, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his application, bearing date of January 1st, 1883, and his absolute surrender of the certificate heretofore held by him

in first and second classes for cancellation, as requested in his application for transfer to the fourth class bearing date of August the 13th, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required, and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World, to Josephine R. Withers, wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary; entered upon the records of the supreme secretary of the endowment rank; upon due notice and proof of death, and good standing in the rank at the time of death, and surrender of this certificate.

Provided, however, that if at the time of the death of said brother, one monthly payment to the endowment fund by
3 members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment to the endowment fund by each member holding an equal amount of endowment—

And it is understood and agreed, that any violation of the within-mentioned conditions, or other requirements of the laws in force governing this rite, shall render this certificate and all claims null and void, and that the said supreme lodge shall not be liable for the above sum, or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest: R. E. COWAN,
Supreme Keeper of Records and Seals.

Issued this 29th day of September, 1885, P. P. No. 11, at Washington, District of Columbia, and registered in Book I, folio 222.

HAHN NELSON,
Supreme Secretary.

And the plaintiff avers that the said Valkenburg, R. E. Cowan and Nelson, who signed the said above-described instrument were authorized by the said defendant to issue the same; that they duly executed and delivered the same to the said R. W. Withers for the benefit of this plaintiff; that the said R. W. Withers, from the issuance of said certificate to the time of his death complied with all the reasonable and legal requirements of the said corporation; that he regularly paid all assessments due by him to the said corporation on account of the said certificate and duly paid all of the premiums on said instrument above described; that the said R. W. Withers departed this life in Greensboro, Hale county, Alabama, in good

standing with the said corporation, under all the reasonable rules and legal regulations of the same, on November 1st, 1895, leaving this plaintiff, his widow, him surviving.

Plaintiff further avers that at the time of the issuance of the said policy the said defendant was a corporation organized and doing business under the laws of the District of Columbia, and that on said 29th day of June, 1894, the said corporation was reincorporated by the said act of Congress above described; that the said
4 corporation, The Supreme Lodge Knights of Pythias, created or reincorporated by the said act of 29th day of June, 1894, was in fact the same corporation which issued the said certificate; that the said corporation created by the act of 29th day of June, 1894, became the possessor of all the rights and assumed all of the liabilities of the said corporation which issued the said certificate, and that after the said 29th day of June, 1894, the said R. W. Withers regularly paid to the endowment rank of said The Supreme Lodge Knights of Pythias, all amounts due by him as a holder of said certificate or as a member of said order.

And this plaintiff avers that the said, The Supreme Lodge Knights of Pythias, was at the time of the issuance of the said certificate, and is now, a company authorized by its by-laws and by the articles of its incorporation to insure the lives of its members for the benefit of those dependent upon them.

The plaintiff further avers that this plaintiff notified the legally constituted officers of the said defendant of the death of said R. W. Withers, and called upon them for payment and for blanks upon which to make the customary proof of death, but that the said legally appointed and constituted officers of said defendant refused to furnish this plaintiff with any blanks for said purpose, and notified this plaintiff that under no circumstances would the said defendant pay the said sum due upon the said certificate or instrument in writing or any part of the same, and which said sum of money with the interest thereon is now due and unpaid, and the plaintiff brings suit.

SEAY AND DE GRAFFENREID,
Att'ys for Pl'ff.

Filed March 3rd, 1896.

B. F. OWENS, *Clerk.*

Executed by leaving a copy of the within summons and complaint with E. T. Hutchinson, keeper of records and seals, and S. W. Chadwick, master of exchecker of Eureka Lodge No. 29 Knights of Pythias, Greensboro, Alabama. Said E. T. Hutchinson and S. W. Chadwick being agents of the Supreme Lodge Knights of Pythias residing in Greensboro, Ala., March 5th, 1896.

R. W. DRAKE, *Sheriff.*

Petition for Removal.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS, a Corporation under the Laws of Congress of the United States.

To the honorable the circuit court of the State of Alabama for the county of Hale:

The petition of The Supreme Lodge Knights of Pythias, the defendants in the above-entitled cause, respectfully shows unto your honor:

1st. That it, The Supreme Lodge Knights of Pythias, is the defendant in an action at law brought against it by Josephine R. Withers in this honorable court, and that it appears in and by said complaint that petitioner is a corporation under and by virtue of the laws of the Congress of the United States, and was such at the time of the institution of said suit, and is still such corporation, under the laws of the United States as above stated.

The said Josephine R. Withers was, at the time of bringing said suit, and still is, a resident citizen of the county of Hale and State of Alabama.

2nd. That the said action is a suit of a civil nature at common law, in which the matter in dispute exceeds, exclusion of interest and costs, the sum or value of two thousand dollars, and that said controversy arises under the constitution or laws of the United States, and that your petitioner was, at the time of instituting said suit, a corporation organized and existing under and by virtue of the laws of the United States.

3rd. Petitioner offers herewith a bond with good and sufficient surety for its entering into the circuit court of the United States for the southern division of the northern district of Alabama, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if the said court shall hold that said suit was wrongfully or improperly removed thereto; that this petition is filed within the time allowed by law for pleading at the first term of this court after the institution of the suit.

4th. That by the act of Congress entitled "An act to amend the act of Congress approved March 3rd, 1875, entitled An act to determine the jurisdiction of the circuit court of the United States, and to regulate the removal of causes from State courts, and for other purposes, and to further regulate the jurisdiction of the circuit court of the United States, and for other purposes, approved March 3rd, 1887, as amended by an act entitled An act to correct the enrollment of an act approved March 3, 1887, entitled An act to amend sections 1, 2, 3, and 10 of an act to determine the jurisdiction of the circuit court- of the United States, and to regulate the removal of causes from the State courts, and for other purposes, approved March 3d, 1873, approved August 13, 1888," it is the duty of this

honorable court to accept this petition and the said bond, and to proceed no further in this action.

6 Wherefore petitioner prays this honorable court to proceed no further herein except to make an order for the removal of this cause to said circuit court of the United States for the southern division of the northern district of Alabama, and to accept said surety and bond; and as in duty bound it will ever pray.

THOS. G. & CHAS. P. JONES,
Attorneys for Petitioners.

STATE OF ALABAMA, }
Montgomery County. }

Personally appeared before me Leon Weil, a notary public, Chas. P. Jones, who is known to me, and who, being by me duly sworn, deposes and says that he is the attorney of the petitioner in the above petition; that he has read such petition, and knows the contents thereof and the statements therein contained are true.

CHAS. P. JONES.

Subscribed and sworn to before me Apr. 6th, 1896.

LEON WEIL,
Notary Public, Mty. Co., Ala.

Filed April 7th, 1896.

P. F. OWENS, *Clerk.*

Bond for Removal.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS, a Corporation under the Laws of Congress of the United States.

Know all men by these presents, that we, The Supreme Lodge Knights of Pythias, the defendant in the above-entitled cause, as principal, and F. M. Billing and Chas. P. Jones as sureties, are held and firmly bound unto Josephine R. Withers, plaintiff in the above-entitled action, in the sum of five hundred dollars, for the payment of which well and truly to be made we bind ourselves, our successors, heirs, executors, and administrators, jointly and severally, firmly by these presents.

In witness whereof we have hereunto set our hands and seal- this the 6th April, 1896.

The condition of the above obligation is such that, whereas the Supreme Lodge Knights of Pythias have filed in the circuit court of Hale county a petition for the removal of the above-entitled cause, action or suit wherein Josephine R. Withers is

7 plaintiff and said Supreme Lodge Knights of Pythias is defendant, from the circuit court of Hale county, Alabama, to the circuit court of the United States for the southern division of the northern district of Alabama.

Now therefore the condition of the above obligation is such, that if the above-bound Supreme Lodge Knights of Pythias shall

and do well and truly enter or cause to be entered in the said circuit court of the United States for the southern division of the northern district of Alabama, on or before the first day of its next session a copy of the record in said action or suit, and shall well and truly pay or caused to be paid all costs that may be awarded by the said circuit court of the United States if the said court shall hold that the said action was wrongfully or improperly removed thereto, then this obligation to be void and of no effect, otherwise to remain of full force, effect and virtue.

THE SUPREME LODGE
KNIGHTS OF PYTHIAS,
By CHAS. P. JONES,
Its Att'y-in-fact.
F. M. BILLING.
CHAS. P. JONES.

Approved this 7th day of April, 1896.

P. F. OWENS, *Clerk.*

STATE OF ALABAMA, }
Montgomery County. }

Personally appeared before me, Leon Weil, a notary public, Chas. P. Jones, who is known to me, and who being duly sworn, deposes and says that he executed the foregoing bond for and on behalf of the Supreme Lodge Knights of Pythias under and by virtue of the authority thereof.

CHAS. P. JONES.

Subscribed and sworn to before me this the 6th day of April, 1896.

LEON WEIL,
Notary Public, Mty. Co., Ala.

Continuance.

JOSEPHINE R. WITHERS
vs.
THE SUPREME LODGE KNIGHTS OF PYTHIAS. } 413.

APRIL 16TH, 1896.

This day came the parties by attorneys and the cause is con-
8 tinued. But plaintiff claims, and is allowed the right at the next term of this court to contest defendant's application or right to remove the said cause to the United States court.

Order for Removal.

JOSEPHINE R. WITHERS
vs.
THE SUPREME LODGE KNIGHTS OF PYTHIAS. } 413.

OCTOBER 23RD, 1896.

This cause coming on to be heard upon a petition interposed by the defendant for its removal out of this court into the circuit court

of the United States to be held at Montgomery, Alabama, and executing a bond with sureties therein as required by law, upon consideration, the court is of the opinion that the petition ought to be granted.

It is therefore considered by the court that this cause be removed to said circuit court of the United States to be held at Montgomery, Alabama, and the clerk of this court transmit a certified copy of all the papers, records and proceedings of this cause to the clerk of said court upon the payment to him of the cost in this court.

STATE OF ALABAMA, }
Hale County. }

I, P. F. Owens, clerk of the circuit court of said county, hereby certify that the above is a true and correct copy of all the papers, records and proceedings in the above-stated cause.

Given under my hand and seal this 9th day of November, 1896.

[SEAL.] P. F. OWENS,
Clerk Circuit Court, Hale County, Ala.

Filed Jan. 9, 1897.

J. W. DIMMICK, *Clerk.*

Demurrer of Defendant.

In the U. S. Circuit Court, Middle District of Alabama, at Montgomery, Ala.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS.

9 Comes the defendant by attorney, and demurs to the complaint filed in said cause, and for grounds thereof, assigns the following:

1st. Because it is averred in said complaint that R. W. Withers complied with all legal and reasonable requirements of said corporation, but fails to state what said requirements were.

2nd. Because the averment last above quoted, is the conclusion of the pleader, and because no facts or circumstances are shown as to the requirements of said corporation.

3rd. That said complaint shows that R. W. Withers departed this life in good standing with said corporation under all the rules and reasonable regulations of the same, and it is not shown what the rules or regulations were; nor does it show what rules the pleader asserts or claims to be legal and reasonable; and what illegal or unreasonable.

4th. Because said averment is the conclusion of the pleader and not the statement of a fact.

THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

Filed June 23, 1897.

J. W. DIMMICK, *Clerk.*

Jury and Verdict.

TUESDAY, *July* 6, 1897.

Judgment.

JOSEPHINE R. WITHERS
vs.
THE SUPREME LODGE KNIGHTS OF PYTHIAS.

This cause having been duly removed from the circuit court of the State of Alabama from the county of Hale in said State, the court in which the suit was commenced, to the circuit court of the United States for the southern division of the northern district of Alabama, on the ground that plaintiff and defendant were and are citizens of different States, and having by consent of the several parties thereto been transferred from said last-mentioned court to this court for trial, come the parties by their attorneys and issue being joined on the plea of the general issue and on a special plea of defendant setting up a forfeiture of the certificate or contract sued upon, as shown by written agreement of the parties filed herein, comes a jury of twelve good and lawful men, to wit: W. H. Durden, foreman, and eleven others, who upon their oaths say: "We the jury find for the plaintiff and assess her damages at three thousand three hundred and ninety-two and $\frac{54}{100}$ ($3,392.54) dollars. It is therefore considered and adjudged that the plaintiff have and recover of defendant the said sum of $3,392.54, together with the costs of this suit for which let execution issue.

Bill of Exceptions.

Agreement of counsel under which case was tried.

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1897.

SUPREME LODGE KNIGHTS OF PYTHIAS
vs.
JOSEPHINE R. WITHERS.

Be it remembered that at the May term, 1897, of the circuit court of the United States for the middle district of Alabama, the following proceedings were had in said cause:

The parties by their attorneys made and filed in open court the following agreement, under which the demurrer to the complaint was withdrawn, and under which the case was tried, and court and parties waived the filing of former pleas and replications in the case. The agreement of counsel was as follows:

"In this case it is agreed that the same shall be tried upon the complaint and upon pleas setting up the general issue and a forfeiture of the certificate sued upon, with leave to give in evidence any fact which might be specially pleaded to the cause of action set

out in the complaint, and with like leave on the part of the plaintiff to give in evidence any fact which — in rebuttal of any such plea, or in confession and avoidance thereof.

It is further agreed that if plaintiff is entitled to recover, she is entitled to recover the sum of three thousand dollars, the amount of the certificate, with interest from the 5th day of November, 1895. If the court shall be of opinion that the law upon the evidence is for the plaintiff, it shall charge the jury to find a verdict for the plaintiff for three thousand dollars, and interest from November 5th, 1895; otherwise it shall charge the jury to find for the defendant.

(Signed) ED. DE GRAFFINREID,
C. E. WALTER,
H. C. TOMPKINS, *Attorneys for Pl'ff.*
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

11 *Agreement as to Testimony of S. W. Chadwick.*

The plaintiff then introduced a further agreement of counsel, which is in words and figures as follows, to wit:

It is admitted in this case as follows: That S. W. Chadwick, if present, would testify as follows: My name is S. W. Chadwick, and I am now and have been for more than twenty years the sec'y of section No. 432, endowment rank, Knights of Pythias of the World. Robert W. Withers was a member of said rank, and he has paid over to me regularly as secretary of said rank his dues on account of his policy No. 11072, and the money was regularly remitted to the secretary of the board of control at Chicago. The last payment that was made to me by Col. Withers was for the dues for the month of October, 1895, which money was paid to me prior to the 10th day of October, 1895. There were large numbers of men who were members of the said section, and as I did not collect from all of them their dues until the latter part of October, I did not send the money to the board of control at Chicago until the 31st day of October, 1895. Having collected by the 31st day of October all of the dues due by all of the members of the section for the month of October, I mailed in the afternoon of October 31st, 1895, to H. B. Stolte, sec'y of the board of control, Chicago, Ill., a check covering all of the amounts due by all of the members of said section for the month of October. At that time the mail in Greensboro was made up early in the evening, and when letters were placed in the post-office after the mail had been made up by the postmaster, such letters went into the mail of the next day. As sec'y of the section, I kept a set of books, and my books show and I positively recollect that I mailed the letter with a check for money on the afternoon of the 31st of October, 1895. I sent the money by a check just as I had always previously done.

It had never been the custom at my office for me to send the money off by the 20th of the month. I usually sent the money off about the last days of the month. For the previous year I had mailed to the sec'y of the board of control the dues of the section as

follows: October 27th, 1894, November 28th, 1894, December 29th, 1894, January 29th, 1895, February 27th, 1895, March 30th, 1895, April 29th, 1895, June 29th, 1895, July 8th, 1895, August 29th, 1895, September 28th, 1895, October 28th, 1895, October 31st, 1895—all of which sums were accepted by the board of control.

When the money reached Chicago after the first of the
12 month, Mr. H. B. Stolte mailed to me, as sec'y of section No. 432, a letter, a substantial copy of which is hereto attached marked Exhibit X for identification. These letters I always destroyed, and did not inform the members of the section of the receipt of them, as I knew the money had reached Chicago by the time I received the letter.

I am a banker and insurance agent.

It is admitted that no notice was ever mailed at any time by the sec'y of the board of control, or of any other member thereof, to Col. Robert W. Withers, notifying him of his suspension by reason of the failure of the sec'y of section 432 to remit the dues of the section to the board of control in time to reach the board of control on the first day of the month succeeding the month in which such dues became due. It is admitted that Robert W. Withers, named in policy No. 11072, died of an attack of cholera morbus on November 1st, 1895, and that he was taken sick and died on that day, and that proof of death has been waived by the defendant, and on the 5th day of November, 1895, defendant refused to pay the amount of the certificate, or any part of it, denying any and all liability on such certificate.

(Signed) ED. DE GRAFFINREID,
H. C. TOMPKINS,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorney for Defendant.

Letter from Board of Control.

EXHIBIT X.

Office of board of control of the endowment rank, Knights of Pythias.

CHICAGO, *Nov.* 1, 1895.

S. W. Chadwick, secretary section 432, endowment rank, Knights of Pythias.

DEAR SIR AND BRO.: You are hereby notified that the above section having failed to pay the monthly payment and dues for the month of October, 1895, as required under article IV, section 6 of the general laws, the section and all members thereof stand suspended, and such members' certificates have thereby become forfeited.

Under provisions of said law, the section may regain all
13 rights as a section, and any surviving members thereof (not less than five) may regain full rights and privileges, if, within

thirty days from the date of suspension, payment of all monthly payments, assessments of dues, accrued upon said members, is made to the board of control.

Less than five members of a section so suspended may, upon the payment to the board of control, within thirty days from suspension of all accrued monthly payments, assessments or dues, and 50 cents each for a clearance card, regain membership and all rights and privileges attached thereto, whereupon clearance cards will be issued them, such member shall be held subject to all requirements governing the issue of clearance cards as provided for in article IV, section 8 of the general laws.

The board of control express the hope that the membership will avail themselves of the privileges thus afforded by law, and cause immediate payment of all arrearages to be made.

Fraternally yours,

(Signed) H. B. STOLTE,
Sec'y Board of Control.

The plaintiff then introduced the policy or certificate of membership sued on, No. 11072, which is in words and figures as follows, to wit:

No. 11072. *Certificate of Membership.* Fourth class. $3,000.

Endowment rank of the order of Knights of Pythias.

This certifies that Brother Robert W. Withers received the endowment rank of the order of Knights of Pythias in section No. 432 on March 2nd, 1883, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his application, bearing date of January 1, 1883, and his absolute surrender of the certificates heretofore held by him in 1st and 2nd classes for cancellation as requested in his application for transfer to the fourth class, bearing date of August 13th, 1885, all of which is made a part of this contract, and the payment of the prescribed admission fee; and in consideration of the payment hereafter to said endowment rank of all monthly payments as required, and the full compliance with all the laws governing this rank, now in force, or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias
14 of the World to Josephine R. Withers, wife, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by change of beneficiary, entered upon the records of the supreme secretary of the endowment rank; upon due notice and proof of death, and good standing in the rank at the time of death and surrender of this certificate.

Provided, however, that if at the time of death of said brother, one monthly payment to the endowment fund by members holding an equal amount of endowment, shall not be sufficient to pay the amount of endowment held by said brother, the benefit to be paid in case of death shall be a sum equal to one payment to the

endowment fund by each member holding an equal amount of endowment. And it is understood and agreed, that any violation of the within-mentioned conditions of the requirements of the laws in force governing this rank, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

In witness whereof, we have hereunto subscribed our names and affixed the seal of the Supreme Lodge Knights of Pythias of the World.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest: R. E. COWAN,
[SEAL.] *Supreme Keeper of Records and Seal.*

Issued this 29th day of September, 1885, at Washington, District of Columbia, and registered in Book 1, folio 222.

(Signed) HALIN NELSON,
Supreme Secretary.

Indorsed: Filed June 23, 1897. J. W. Dimmick, clerk.

Section 4 of General Laws.

The plaintiff then introduced section 4, Exhibit "Marked C" of the general laws, which is in words and figures as follows, to wit:

On January 25th, 1894, defendant adopted and promulgated the following general laws: "Section 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of section without notice, on the first day of each and every month; and a failure to make such payment on or before the tenth day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title and interest such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case
15 of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the board of control, a new certificate shall be issued and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

It is agreed that said above general law has never been repealed and still exists as a law of the corporation, the defendant in this suit, and has existed as such ever since January 25th, 1894, and that the same subject to legal exception, may be had in evidence in this cause, the cause being Josephine R. Withers *vs.* Knights of Pythias of the World.

(Signed) ED. DE GRAFFINREID,
H. C. TOMPKINS,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

Indorsed: Filed June 23, 1897. J. W. Dimmick, clerk.

Article IV, General Laws Endowment Rank.

The plaintiff then introduced article IV of the general laws endowment rank Knights of Pythias of the World, and the following agreement of counsel in reference thereto:

"It is admitted, subject to legal exception, that article 4 of the general laws of the endowment rank of Knights of Pythias of the World is as follows: "Each applicant for membership in the endowment rank shall, upon completion of his application for transmission to the board of control, pay to the secretary of the section, in accordance with his age and the amount of endowment applied for, a monthly payment as provided in the following table, and, if accepted, such member shall continue to pay the same amount each month thereafter as long as he remains a member of the endowment rank, unless otherwise provided for by the Supreme Lodge or board of control of the endowment rank Knights of Pythias of the World." It is agreed that the tables shall not be set out, but that the amount to be paid by Withers according to the table was $4.90 per month.

(Signed) H. C. TOMPKINS,
ED. DE GRAFFINREID,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

16 *Agreement of Counsel.*

The defendant then introduced a further agreement of counsel, marked B, which is in words and figures as follows, to wit:

It is admitted in this case that R. W. Withers originally held certificates in the first and second class, and that said certificates were issued on an application dated January 1st, 1883, the original of which is hereto attached, and which is the application referred to in certificate No. 11072, being the certificate sued on in this case, and set out in the original complaint.

That R. W. Withers died November 1st, 1895. It is further admitted that the dues for the month of October, which were payable by said Withers by virtue of the certificates above described, were included in a check, and sent by S. W. Chadwick with his remittance, dated October 31st, 1895, which said remittance was received by the board of control on the 4th day of November, 1895. That H. B. Stolte, secretary of the board of control, on the 1st day of November, 1895, no remittance for the October dues from section 432 (of which said R. W. Withers was a member) having reached the board of control, sent S. W. Chadwick a letter, which is attached to a statement of his testimony. That on receipt of said remittance, on the 4th of November, 1895, said H. B. Stolte sent to S. W. Chadwick a receipt on a postal card, a copy of which is hereto attached. That as soon as the board of control learned of the death of said R. W. Withers, it returned to S. W. Chadwick, secre-

tary, by registered letter under date of November 5th, 1895, th amount of the October dues of said Withers, but said S. W. Chad wick returned it to the board of control, where it is now held sub ject to his order. That the following general law was adopted b the defendant in January, 1894, and has never since been repealed and is still in force:

"SEC. 6. The secretary of a section shall forward to the board o control the monthly payments and dues collected immediately afte the tenth day of each and every month.

If such payments and dues are not received by the board o control on or before the last day of the same month, the section s failing to pay, and all members thereof, shall stand suspended fron membership in the endowment rank, and their certificates and al right, title and interest therein shall be forfeited. Notice of such sus pension shall be forthwith mailed by the secretary of the board o control to the president and secretary of such section."

"Provided, that the section whose membership has forfeited thei endowment, and whose warrant has been suspended, shal
17 regain all right as a section, and any surviving member thereof (not less than five) shall regain full rights and privi leges held previous to such forfeiture, if within thirty days from th suspension of warrant, said section shall pay to the board of contro the amount of all monthly payments, assessments and dues accrue upon said members."

SEC. 10. Sections of endowment ranks shall be responsible and liable to the board of control for all moneys collected by the secre tary, or other officers, from the members for monthly payments assessments or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of th members and shall in nowise be considered as the agents of th representatives of the board of control of the endowment rank or o the supreme lodge."

(Signed) H. C. TOMPKINS,
ED. DE GRAFFINREID,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

The defendant then introduced the application for membership in words and figures as follows, to wit:

Application for Membership in the Endowment Rank, Knights o Pythias.

The undersigned is desirous of becoming a member of section No. 432 of the endowment rank of the order of Knights of Pythias This application will become part of the contract, if accepted.

The following answers are to be in the handwriting of the appli cant in his own language:

I. (1) Name at full length Robert Walker Withers. (2) Resi dence, Hale county, Alabama. (3) County of ——. (4) State o

Alabama. (5) Occupation, planter. (6) Other or occasional occupations, ——.

1. (5) Describe the occupation fully.

(7) Are you married? Yes, or single, ——.

(8) Place and date of your birth. (9) Place of birth, Madison county, Alabama. (10) Year, 1834. (11) Month, September. (12) Day of month, second. (13) Age recorded from nearest birthday, 48 yrs.

II. (1) Is there any insurance or endowment on your life? Ans. None. (3) If so, state in what number of certificate, and
18 give the amount. (4) Ans. ——. Has any life insurance company or endowment order ever declined to grant insurance on your life? (6) Ans. Never. If so, what company or order, and how long since? (7) State particulars concerning same. (8) Ans. ——. 11. (1) If in E. R., give the number of certificate.

III. (1) Has any opinion ever been sought for, or any consultation held with any officer of any life insurance company or order, or any physician or surgeon, as to whether your life was safely insurable? (2) Never. (3) If so, state what and give amount. (State particulars.) (4) Ans. ——. (5) If yes, was any decision or opinion given that you were, or that you were not, safely insurable? (State particulars, time and date.) (6) Ans. ——.

IV. (1) Have you ever been abroad for the benefit of your health, upon the advice of your physicians? (2) Ans. Never. (3) If so, state when, where and for what trouble or what disease. (State full particulars regarding date and duration.) (4) Ans. ——. (5) Are you now in the daily habit of using intoxicating liquors? If so, how many times daily? (6) Ans. ——. This question must not be answered by words moderately or "temperately," but a full and explicit answer must be given.

VI. (1) Do you use morphine, opium, or other sedatives in any form? (2) No. (3) If so, what occasions their use and how often do you use them? (4) Ans. ——. (5) Is it upon the advice of a physician? (6) Ans. ——.

VII. (1) Have you ever had, during the last seven years, any sickness or disease necessitating the employment of a physician? (State particulars fully.) (2) One attack of billiousness two years since, lasting a few hours.

VIII. (1) What ages did or have your grandparents attained? (2) Living, paternal, ——. Paternal 70 ——. Maternal, ——. (3) Dead, maternal, 69. (4) What parents do you most resemble? (5) Ans. Blended. VIII to XII. In stating the cause of death avoid such expressions as "general debility," change of life, "fever," exposure "nothing hereditary," or any such indefinite terms.

IX. (1) Are your parents living? Give their age and state of health. Age, if living. (2) Father. (6) Mother, 72. State of health when last heard from. (3) ——. (7) Good. Age at death. (4) 55. (8) ——. Cause of death. (5) Chronic gastritis. State definitely cause of death.

How many brothers have you had? No. (6) Age, if living. 2.42 & 29. State of health when last heard from. 3.4 died infants.

Age at death. (4) Unknown. Cause of death. (5) Unknown. State definitely cause of death.

19 How many sisters have you had? (4) (2) Ranging from 30 to 40 yrs. (3) ——. (4) ——. (5) ——.

(XII.) (1) Have either of your grandparents, parents, uncle or aunts, brothers or sisters, ever had consumption, scrofula, insanity or any hereditary disease? (2) Ans. None. If the expression "childbirth" is used, be particular to state how long after delivery, and also whether there *was* any symptoms of chest troubles.

(XIII.) (1) What class or classes do you desire to enter? State plainly, "first," "second" or "third," or "first and second?" First and second.

To whom do you wish the benefit made payable, and what relationship to you? Write the name and address plainly, giving State, county and city or town. My wife, Josephine P. Withers, Greensboro, Hale county, Ala.

Please read carefully the following declaration and agreement and observe its import:

I declare that I am not now a member of the endowment rank, have not been rejected within the past six months, and am not now under suspension. I declare, furthermore, that all of the above statements are in my handwriting, and are true to the best of my knowledge and belief, and that I have not concealed or omitted to state anything regarding my health, past or present, effecting the expectancy of my life, and that I hereby consent and agree that any untrue statement made in this application, or to the medical examiner, or any concealment of facts touching my health or expectancy of life or suspension from the rank and order, or voluntarily severing my connection with the order, shall work a forfeiture *to* all my rights, the rights of my heirs, and beneficiaries to all benefits and privileges accruing to members of this rank.

I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained. To all of which I willingly and freely subscribe.

Dated at Greensboro, Ala., this the first day of January, 1883.

(Signed) ROBERT WALKER WITHERS,
Member of Eureka Lodge No. 29, Knights of Pythias,
City of Greensboro, State of Alabama.

March 2, '83.

These questions are to be asked and the answers written by the medical examiner only, and in his handwriting, no third per-
20 son to be present at the examination, nor should the medical examiner frame any answers to the questions propounded. The replies to each and every question to be plainly expressed.

XIV. (1) Are you now in good health? (2) Yes. (3) Do you ordinarily enjoy good health? (4) Ans. Yes.

XV. (1) Have you ever been predisposed to, or had any of the following diseases or infirmities? (2) Yes. (3) Have you either now? (4) Has piles slightly.

XV. Answer "yes" or "no" as the case may be, opposite each. If you have had either state how long since, giving full particulars. 1. Apoplexy. No. 2. Asthma. No. 3. Bronchitis or habitual cough. No. 4. Cancer or any tumor. No. 5. Consumption. No. 6. Colic. No. 7. Constipation. No. 8. Disease of the brain. No. 9. Disease of the bowels. No. 10. Disease of the heart. No. 11. Disease of the liver. No. 12. Disease of the bladder. Ans. No. 13. Disease of the kidneys. No. 14. Dizziness. No. 15. Discharges from ear. No. 16. Dropsy. No. 17. Diarrhœa. No. 18. Delirium tremens. No. 19. Dysentery. No. 20. Dyspepsia. No. 21. Erysipelas. No. 22. Eruption or disease of the skin. No. 23. Fevers of any kind. Yes. 24. Fistula in ano. No. 25. Fits or convulsions. No. 26. Frequent desire to urinate. No. 27. General debility. No. 28. Gout. No. 29. Gravel. No. 30. Headache, frequent or severe. No. 31. Insanity. No. 32. Jaundice. No. 33. Lumps or swelling in any part of the body. No. 34. Pain in back. Yes. 35. Pneumonia. No. 36. Pleurisy. No. 37. Paralysis. No. 38. Piles. Yes. 39. Rheumatism. No. 40. Rupture. No. 41. Smallpox. No. 42. Spitting or raising of blood or other hemorrhages. No. 43. Swelling of feet, hands or eyelids. No. 44. Stricture of uret-ra. No. 45. Syphilis or gonoerhœa. No. 46. Scrofula. No. 47. Varicose veins. No. 48. Ulcers or open sores. No.

Answer each question briefly but completely.

XVI. (1) Have you ever had or have you now any other disease or infirmity than above mentioned? (2) No. (3) Have you ever met with any accident or personal injury, or undergone any surgical operation? (State particulars.) (4) Was operated upon for piles in 1865.

XVII. (1) Have you been successfully vaccinated? (2) Yes. (3) When were you last vaccinated? (4) Dec., 1881.

XVIII. (1) Are you aware of anything regarding your health, habits, circumstances, or family history, not already stated, that should be known, in order to fairly estimate the risk upon your life? (2) Ans. No. (3) Have you been liable to cough, difficulty or breathing, habitual expectoration, pain in the chest, or any other pulmonary symptoms, or palpitation of the heart? (If so, state particulars.) (4) Ans. No.

21 XIX. (1) Are you willing that your family physician should, in the interest of the endowment rank, give it all the information in his power regarding your physical condition, habits and general health? (2) Ans. Yes. (3) Give name and address of your family physician. (4) Ans. F. M. Peterson, Greensboro, Hale county, Ala.

I hereby further declare that I have understood all the above questions put to me by the medical examiner, and the answers

thereto, and that the same are warranted by me to be true, and that I am the same person described above.

ROBERT WALKER WITHERS,
Applicant for Membership in the Endowment Rank.

Witness:
R. INGE, M. D.

Medical Examiner's Certificate.

(Special instructions to medical examiners.)

It is expected that the medical examiner will familiarize himself with the "rules to be observed by the medical examiners of the E. R. K. of P., in the examination of applications for membership," in whom the highest interest of the endowment rank are entrusted, and it is also expected that he will communicate directly with the medical examiner-in-chief any additional information bearing on this case. Such communications will be held strictly confidential.

XX. (1) Have you carefully questioned the applicant concerning the matters mentioned in questions I to XIX; and are statements made apparently correct? (2) Ans. Yes. (3) What is your opinion of the influence of his occupation on the risk? (4) Ans. Beneficial to the risk.

XXI. (1) Height, 5 feet, 10 inches. (2) Weight, 160 pounds. (3) Number of inches around the chest under the vest, on full inspiration 38 inches. On deep expiration 35 inches. (4) Girt of waist, 34 inches. (5) Figure. Good. (6) General appearance. Healthful.

XXII. (1) What is your opinion in regard to the health of his place of business, or residence? (2) Ans. Good. (3) What is your opinion in regard to any former injury or sickness? (4) Ans. No traces of disease left.

XXIII. (1) Has the applicant the appearance of one addicted to the use of intoxicating beverages? (2) Ans. No. (3) If so, to what extent? (State fully and explicitly all you know regarding this question.) (4) ——.

XXIV. Is there anything in his speech, looks, gait or manner of conducting himself, that would lead you to suspect that the
22 applicant has any disease, organic or functional, of the brain, or any other portion of his nervous system, or any predisposition thereto? (2) Ans. No.

XXV. (1) Has the applicant paralysis, cramps, tremor, atrophy, or rigidity, in any portion of his muscular system? (2) Ans. No. (3) Is his gait firm and elastic? (4) Ans. Yes.

XXVI. (1) Upon auscultation and percussion is the respiratory murmur clear and distinct over both lungs? (2) Ans. Yes. (3) Is the character of the heart's action uniform, free and steady? (4) Ans. Yes. (5) Are its sounds regular and normal? (6) Ans. Yes. (7) Are the respirations full, easy and regular? (8) Ans. Yes. (9) Number of respirations per minute? (10) Ans. 17. (11) Rate of pulse while standing? (12) Ans. 85 per minute. (13) Rate of

pulse while sitting? (14) Ans. 80 per minute. (15) Does it intermit or become unsteady? (16) Ans. No. Or irregular (Ans.) ——. (17) Are there any indications whatever of disease of the organs of respiration? (18) Ans. No. (19) Are there any indications whatever of disease of the heart or blood-vessels? (20) Ans. No.

XXVII. (1) Is the applicant deaf, lame, or has he any natural or other deformity? (2) Ans. No. (3) Is he ruptured? (4) Ans. No. (5) Is it single or double? (6) Ans. ——. (7) Is it reducible or not. (8) Ans. ——. (9) Is a suitable truss worn? (10) Ans. ——. (11) If ruptured, does he agree to habitually wear a suitable truss? (12) Ans. ——.

XXVIII. (1) Are the functions of the abdominal and urinary organs in a healthy condition? (2) Ans. Yes. (3) Are there are any indications, whatsoever, that the applicant is not entirely well and in good health? (4) Ans. No. (5) Do you consider the party in all respects safely assurable? (6) Ans. Yes. (7) Do you recommend him for membership? (8) I do.

I hereby declare that I have this day carefully examined the above-named applicant, and that I have written and attentively considered the foregoing statement, made by him, and witnessed his writing the signature as appears upon the reverse of this document. Dated at Greensboro, Ala., this first day of Jan., 1893.

(Signed) R. INGE, M. D.,
Medical Examiner, Section No. 432, Graduate of Univ. of Va. Medical College, Charlottesville, Va., Class of 1870, Va., and Univ. of New York, New York, 1871, N. Y.

Certificate of Lodge.

This to certify that brother knight, Rob't W. Withers, is a member of the knight's rank of Eureka lodge No. 29, of the grand
23 jurisdiction of Alabama, city or town of Greensboro, Ala., in good standing, and that his dues are paid to Jan'y 1st, 1883.

(Signed) WM. H. SANBORN,
Master of Finance.

Attest: E. T. HUTCHINSON,
[SEAL.] *Keeper of Records and Seal.*

Report of Committee on Character.

To the officers and members of section No. 432, E. R., K. of P.:

We, your committee, appointed to examine into the character of Bro. Rob't W. Withers, who desires to become a member of this rank, beg leave to report, that he is of good moral character, and his habits of life are correct and temperate, and recommend that he be duly admitted.

(Signed) A. B. LOVEMAN,
T. E. COWAN,
S. W. CHADWICK,
Committee.

Balloted for and accepted Jan'y 12, 1883.

(Signed) WM. H. SANBORN,
Secretary and Treasurer Section No. 432.

Endorsements: Application No. 11072 of W. R. Withers. To section No. 432. Both. Endowment rank. K. of P. Certificate issued M'ch 9, 1883. First class No. 15013. Second class No. 20136. Approved February 14th, 1883. A. R. Booth, M. D., medical examiner-in-chief. Received Mar. 9, 1883. Endowment rank, K. of P.

Instructions.

All blanks on this part of the application are to be filled by the S. M. of E. and medical examiner-in-chief. Secretary and treasurer of section will see that all other blanks are properly filled and all questions are answered, before forwarding the application.

Endorsement by clerk: Filed June 23, 1897. J. W. Dimmick, clerk.

Remittance Envelope.

Defendant then introduced one envelope marked F, in which remittance sheet was enclosed, with a U. S. stamp on it, and on which were the following words and figures:

Postmark: Greensboro, Ala., Nov. 1, 1895. Endowment rank, Knights of Pythias. If not called for in ten days, return to S. W. Chadwick, banker, Greensboro, Ala. This envelope bore the
24 following directions: Board of control, endowment rank, Knights of Pythias, rooms 43 to 49, Commerce building, 14 & 16 Pacific Ave., Chicago, Illinois.

Endorsement of clerk: Filed June 23, 1897. J. W. Dimmick, clerk.

Remittance Sheet.

The defendant then introduced remittance sheet in words and figures as follows, to wit:

K. of P. Endowment rank, K. of P., Nov. 4, 1895.

Section No. 432, endowment rank, K. of P.

Remittance Blank.

Payment for month of October, 1895.

GREENSBORO, ALA., *Oct.* 31*st*, 1895.

Board of control, endowment rank, Knights of Pythias, rooms 43 to 49, Commerce building, Chicago, Ill.:

Enclosed please find cashier's draft for $113.30.

	Number of members.	Amount of endowment.	Monthly payments.	Monthly dues.
Paid as per last report.....	31	9,200*0*	$108.70	4.60
Admitted since..... (State names, amounts, etc., on back of blank.)				
Total to be accounted for.. (State names, amounts, etc., on back of blank.)	31	9,200	$108.70	4.60
Deductions since last report.....				
Due as per remittance.....	31	9,200	$108.70	4.60

Fraternally yours,

[SEAL.]

S. W. CHADWICK,
Secretary Section No. 432.

25 Secretaries will observe the following:

This blank must be correctly filled out, seal of section impressed, and forwarded to the office of the board of control, endowment rank, Knights of Pythias, accompanied by the exact amount due from the section for the monthly payment and monthly instalment of dues remitted. If incorrect the board of control reserves the right to return the remittance at the risk of the section. But one monthly payment and monthly instalment of dues must be shown on each blank. The amount due and money remitted must agree.

Secretaries are requested to forward remittances by post-office money order, express money order, or by bank draft on New York, Chicago or St. Louis, drafts to be made payable to the secretary of the section, and indorsed by him officially, payable to board of control endowment rank, K. of P.

If remittance is made by bank draft it is understood that the credit given the section on day of its receipt is subject to the payment of the draft by the bank upon which it is drawn.

If remittance is made by post-office money order, advise payment to board of control, endowment rank, K of P. This is necessary to collect the money. Under no circumstances will individual checks be received. The remittance will positively be returned if made in that manner.

Instructions to the Secretary.

1. The blank must always be used in remitting monthly payments and dues. Your money will not be applied otherwise.

2. In forfeiture of certificate, give cause, whether for non-payment of monthly payments and dues, or on account of suspension from lodge.

3. If a member wishes to resign, all monthly payments and dues prior to the date of resignation must be paid. If he fails to pay the monthly payments and dues, his membership and certificate must be reported as forfeited.

4. A member taking a clearance card, must not be reported to the board of control as withdrawn until the secretary has been notified that the card has been deposited in another section. Until then, he must be treated as a member of the section issuing the card, and if he fails to pay monthly payments and dues, as required under the law, he forfeits his membership and certificate.

5. Members changing occupation, by which monthly payments *is* increased or decreased, are to be reported here, showing the
26 amount of increase or decrease, only, which must be added to or deducted from the face of the blank. The additional or reduced payment shall begin with the month next following such change of occupation.

Do not repeat names of members previously reported, but show only "additional" and "deductions" since last report.

Statement of Additions Liable for This Payment.

The blank must be filled by the secretary, otherwise the same will be returned.

Certificate No. —, name —— ——, age —, amount of endowment —, monthly payment —, m'thly dues —. State how admitted, if new member, readmission, or by card, from what section; also additional payment by reason of increase or change of occupation.

Statement of Deductions Since Last Report.

This blank must be filled by the secretary, otherwise no deductions will be allowed on this assessment.

Certificate No. —, name —— ——, age —, amount of endowment —, monthly payment, —, m'thly dues —. Give cause of deduction, whether by forfeiture, withdrawn by card, resignation, death or change of occupation. If withdrawn by card, give section admitted to.

Clerk's indorsement: Filed June 23, 1897. J. W. Dimmick, clerk.

This was all the evidence. Thereupon, the court being of the opinion that the defendant was liable, charged the jury, as it was agreed in event the court so found, to find a verdict for the plaintiff for the sum of three thousand dollars, with interest from the 5th of November, 1895, and the defendant then and there duly excepted to the giving of said charge before the jury retired. And defendant, thereupon, requested the court in writing, to charge the jury, "if they believed the evidence, they must find for the defendant," which charge was asked in writing; and the court refused to give said charge, and the defendant then and there excepted to the refusal to give said charge, before the jury retired. And the defend-
ant now tenders this, as its bill of exceptions, which is signed,
27 sealed and allowed as such by the Hon. John Bruce, presiding judge of said court, in term time.

Dec. 6, '97.

JOHN BRUCE, *Judge.*

We agree *that* the above bill of exceptions and that the same be signed by the presiding judge of term time.

ED. DE GRAFFENREID,
TOMPKINS & TROY,
Att'ys for Pl'ff.

Filed Dec. 6, 1897.

J. W. DIMMICK, *Clerk.*

Opinion of the Court.

In the Circuit Court of the United States for the Middle District of Alabama, May Term, 1897.

JOSEPHINE R. WITHERS
vs.
THE SUPREME LODGE KNIGHTS OF PYTHIAS.

BRUCE, *J.:*

This cause is submitted to the court upon an agreed statement of facts set out in the record.

The suit is upon a policy of insurance by the beneficiary named in the policy, and the defence is that the policy was forfeited at and before the time of bringing the suit.

Withers, the member whose right is here involved, was a member of the endowment *b*ank, section No. 432, at Greensboro, in the State of Alabama.

He had duly paid all his assessments and dues, including the monthly dues for the month of October, 1895, and these payments were made to the secretary in his section, one Chadwick, who testifies: "The last payment that was paid to me by Col. Withers was for the dues for the month of October, 1895, which money was paid to me prior to the 10th of October, 1895."

The secretary, Chadwick, further testifies: "There were a large number of men who were members of said section and as I did not collect from all of them their dues until the latter part of October I did not send the money to the board of control, at Chicago, until the 31st day of October, 1895. Having collected by the 31st day of October all of the dues due by all the members of the section for the month of October, I mailed in the afternoon of October 31, 1895, to H. B. Stolte, secretary of the board of control, Chicago, Ill., a check covering all the amounts due by all the members of said section for the month of October." * * *

28 "I sent the money by a check just as I had always previously done." * * * "When the money reached Chicago, after the first of the month, Mr. H. B. Stolte mailed to me, as secretary of section 432, a letter, a substantial copy is hereto attached. These letters I always destroyed and did not inform the members of the section of the receipt of them as I knew the money had reached Chicago by the time I received the letter."

It appears the money did not reach the board of control until the

4th of November and Robert W. Withers died on the 1st day of that month.

The proposition of the defendant company is that this policy lapsed and became forfeited because the monthly dues of the insured for October, 1895, *was* not paid to the board of control, before the 1st of November, in Chicago. A brief examination of the law and scheme of insurance of the defendant company is necessary at this point. Section 4 provides: "Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of the section without notice on the first day of each and every month." * * *

SECTION 6. "The secretary of a section shall forward to the board of control, the monthly payments and dues collected, immediately after the tenth day of each and every month.

If such payments and dues are not received by the board of control on or before the last of the same month, the section so failing to pay, and all members thereof, shall stand suspended from membership in the endowment *b*ank, and their certificates, and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section."

"Provided, that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a section, and any surviving members thereof (not less than five), shall regain full rights and provisions held previous to such forfeiture, if within thirty days from the suspension of warrant, said section shall pay to the board of control the amount of all monthly payments, assessments or dues accrued upon said members."

"SECTION 10. Sections of the endowment ranks shall be responsible and liable to the board of control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of the members and shall in nowise be considered as the agents or the representatives of the board of control of the endowment rank or of the supreme lodge."

29 Without discussing the effect of sec. 10, to which reference will presently be made, it is very clear that under sections 4 and 6 the dues of the members were to be paid to the secretary of the section, and by sec. 6 it is made his duty to forward to the board the monthly payments and dues collected, so that the local secretary whether he is in any sense to be considered the agent of the supreme lodge or not, he is to collect the dues and forward to the board of control and this seems to have been the law of the organization prior to January, 1894, when sections 6 and 10 seem to have been adopted, though, it may not be entirely clear what change was intended to be made by the new rules.

The letter of the rule is if such payments are not received by the board of control on or before the last of the same month the section

so failing to pay and all members thereof shall stand suspended from membership in the endowment rank.

We find the dues for October paid promptly by the insured Withers to the local secretary of the section, and we find him charged with the duty of forwarding the same to the board of control at Chicago, and he testifies he did it, and mailed it properly addressed on the last day of October, 1895.

But it is insisted that the money must be paid to, or perhaps it should be said it should reach, the board before the last day of October which it could not do when mailed at Greensboro on the last day of the month.

But if the money was put in the mail as testified, it was put there for transmission; and forward is the word used in the rule, and from the language used and the course of the business can any doubt exist as to the contemplation of the parties at the time as to the means by which the money was to be forwarded.

Whose money was it when mailed under seal and properly addressed, not as to whose risk it was until received by the board of control, but whose money was it, and when placed there was it not payment within the meaning of this order?

This is not the case of a debtor seeking his creditor to pay his debt—here was a course of business, a handling of trust funds by the local officer. The rule does not say that the money shall be paid in person by the local section through its officer to the officer of the board of control in Chicago, but general words are used and the argument proceeds rather upon a construction of the words used than upon the words themselves.

Forfeitures must be clear and courts do not favor them. In this case there has been no default. The insured paid his monthly dues, but by the scheme of insurance of the defendant company the failure of the secretary of the local section to have the money reach the board of control before the last of October is a default which imputed to the section and to every member of the section of the endowment rank, and without notice to the insured other than the notice to the secretary of the section, it is insisted that this is a case for a forfeiture of vested rights. I think that the court cannot so hold upon the words of the insurance law itself and if that rests in doubt then the operation of the rule as claimed would seem to be obnoxious to that fundamental principle of the law which forbids the taking of life, liberty, or property without due process of law. Again, can this scheme of insurance shown in the rules and law of the defendant be sustained upon sound legal principles? When the money for the monthly dues was received by the board of control in Chicago a receipt signed by H. R. Stolte, secretary board of control, of the following purport was recieved by secretary, Chadwick, of the local section: "Received in payment of monthly dues for October, 1895, on condition that all members from whom above payment is made were living at the date of this receipt," which is November 4, 1895. It was said in the argument, in reply to the proposition insisted upon that the defendant company had and retained the money and was, therefore, not in a position to

resist the payment of the loss, that this was but a conditional receipt, or receipt upon condition, for the money, and that may have been an answer to the proposition presented in behalf of the plaintiff herein, but, apart from that, here is a scheme of insurance which provides in case of forfeiture a way of recovery for surviving members, but if the member dies, as in this case, between the time that the dues are mailed for transmission to the board of control at a distant point, in this case Chicago, Illinois, and its receipt by the board of control there is no means by which his representative in interest or the beneficiary in the policy can be restored from the penalty of the forfeiture. Policies of insurance are taken out and the whole scheme of insurance contemplates that it is not for the benefit of the assured, but for the benefit of those dependant upon him, and if you eliminate this element from it life insurance as a system would be deprived of the main reason by which it has won its way to favor. And yet here the survivor can be relieved from the forfeiture, and is relieved, "if within thirty days from the suspension of warrant said section shall pay to the board of control the amount of all monthly payments, assessments or dues accrued upon said members," but he who dies, as stated, however prompt he may have been in payment of dues, and though no personal default can be attributed to him, still his policy is forfeited and his beneficiary is without relief or any means by which he can save himself.

Again, what does section 10 mean, and is it a clear-cut
31 proposition putting the policy-holder upon notice not only that he is to pay his dues promptly or suffer the penalty of the forfeiture if he does not, but that he is also made responsible with the other members of his section for all the dues due to grand lodge, and is made responsible for the failure of the local secretary for his failure to forward the dues.

What is the significance of the words in section 10, "Officers of sections are the agents of the members and shall in nowise be considered as the agent or the representative of the board of control of the endowment rank or of the supreme lodge."

In the face of these rules the policy-holder will perhaps find that his responsibility was not meant by the prompt payment of all dues, but other responsibilities are charged upon him, and will the courts maintain forfeitures where there is no personal default chargeable to the policy-holder but only such as is made to fall upon the section in its aggregate capacity.

Among the authories cited is the case of Campbell *vs.* Knights of Pythias, which is perhaps the strongest case cited in behalf of the defendant company, and yet the concluding sentence in that opinion shows that it is not the case that we are dealing with.

The case at bar is an instance of that kind and the case is at least not entirely in point.

The court finds for the plaintiff and the judgment will be entered as upon a verdict of a jury.

Order Allowing Appeal.

In the Circuit Court of the United States for the Middle District of Alabama. At Law.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS.

The defendants in the above-stated cause having given bond and security as required by law, and filed with the clerk of this court an assignment of errors, it is ordered that the writ of error prayed in the above petition, be and the same is hereby allowed.

JOHN BRUCE, *Judge.*

Dec., 6, '97.

Filed Dec. 6, 1897. J. W. Dimmick, clerk.

32 *Petition for Writ of Error and for Approval of Supersedeas Bond.*

In the Circuit Court of the United States for the Middle District of Alabama. At Law.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS.

To the Hon. John Bruce, one of the judges of said court, in vacation:

The said Supreme Lodge Knights of Pythias, respectfully shows unto your honor, that in the above-entitled cause, on, to wit: the 6th day of July, 1897, at a regular term of said court, a judgment was rendered against the said Supreme Lodge Knights of Pythias for the sum of three thousand dollars three hundred and ninety-two $\frac{54}{100}$ dollars, as damages, and the costs in that behalf sustained in favor of the said plaintiff; that said defendants hereby present a supersedeas bond as required by law (the amount of which said bond has been fixed by agreement between the defendant and the plaintiff herein) and filed herewith an assignment of errors.

Wherefore, the said defendants pray that said supersedeas bond may be approved and that a writ of error may be allowed to them from said judgment to the United States circuit court of appeals for the fifth circuit, and that a transcript of the record and proceedings and papers upon which said judgment was rendered, duly authenticated, may be sent to the said United States circuit court of appeals, for said fifth circuit.

THOS. G. & CHAS. P. JONES,
Attorneys for Defendants.

Filed Dec. 6, 1897.

J. W. DIMMICK, *Clerk.*

Assignment of Errors.

In the Circuit Court of the United States for the Middle District of Alabama. At Law.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS.

And now comes the said The Supreme Lodge Knights of
33 Pythias, by Thos. G. and Chas. P. Jones, their attorneys of record and say that in the record and proceedings in the above cause, manifest error has intervened to their injury, and they assign the following as grounds of error:

First. The court erred in instructing the jury "to find a verdict for the plaintiff with interest from the 5th day of November, 1895."

Second. The court erred in refusing to instruct the jury at the instance of the defendant, as follows: "If they believe the evidence they must find for the defendant."

THOS. G. & CHAS. P. JONES,
Att'ys for Defendant.

Filed Dec. 6, 1897.

J. W. DIMMICK, *Clerk.*

Writ of Error and Supersedeas Bond.

In the Circuit Court of the United States for the Middle District of Alabama. At Law.

JOSEPHINE R. WITHERS
vs.
SUPREME LODGE KNIGHTS OF PYTHIAS.

Know all men by these presents, that we, the Supreme Lodge Knights of Pythias, as principal, Edward A. Graham, Wade A. McBryde and Jacob Greil are held and firmly bound unto Josephine R. Withers in the full and just sum of forty-five hundred ($4,500.00) dollars to be paid to said Josephine R. Withers, her certain attorney, executors, administrators or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents.

Sealed with our seals, and dated this 2nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas, at a circuit court of the United States for the middle district of Alabama, in a suit depending in said court between Josephine R. Withers and the Supreme Lodge Knights of Pythias, a judgment was rendered against said Supreme Lodge Knights of Pythias and the said Supreme Lodge Knights of Pythias having obtained a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Josephine R. Withers, citing and

admonishing her to appear before the circuit court of ap-
34 peals for the fifth circuit to be holden at New Orleans, Louisiana, within thirty days from the date thereof.

The condition of the above obligation is such, that if the said Supreme Lodge Knights of Pythias shall prosecute their appeal to effect, and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, else, to be and remain in full force and virtue.

SUPREME LODGE KNIGHTS OF PYTHIAS,
By THOS. G. & CHAS. P. JONES, *Its Att'ys.*
JACOB GREIL.
WADE A. McBRYDE.
EDWARD A. GRAHAM.

Approved.
JOHN BRUCE, *Judge.*

Dec. 6, '97.

Filed Dec. 6, 1897.

J. W. DIMMICK, *Clerk.*

Citation.

THE UNITED STATES OF AMERICA:

The President of the United States to Josephine R. Withers:

Your are hereby cited to be and appear before the United States circuit court of appeals, for the fifth circuit, at New Orleans, Louisiana, within thirty days from the date hereof, pursuant to an order of appeal granted and filed in the clerk's office of the circuit court of the United States for the middle district of Alabama, wherein The Supreme Lodge Knights of Pythias are appellants and you are appellee, to show cause, if any, why the decree rendered against the appellant as in said order of appeals mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the hand of the Honorable John Bruce, judge of the district court of the United States, this 22nd day of December, in the year of our Lord, one thousand eight hundred and ninety-seven.

[SEAL.] JOHN BRUCE, *Judge.*

Service of the within citation is hereby accepted and copy waived Dec. 22nd, 1897.

TOMPKINS & TROY,
Att'ys for Def't in Error.

35 *Clerk's Certificate.*

UNITED STATES OF AMERICA, }
Middle District of Alabama, } *ss:*

I, J. W. Dimmick, clerk of the circuit court of the United States for the middle district of Alabama, hereby certify that the foregoing

pages numbered from one to —, inclusive, contain a full, true and complete transcript of the record and proceedings in a cause lately depending in said court, wherein Josephine R. Withers was plaintiff, and The Supreme Lodge Knights of Pythias, defendant, as the same appears of record and on file in my office as such clerk.

In testimony whereof, I have hereunto set my hand and caused the seal of said court to be affixed at Montgomery, in said district, this the 23rd day of August, A. D. 1897.

[SEAL.] J. W. DIMMICK,
Clerk U. S. Circuit Court, Mid. Dist. of Alabama.

36 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

TUESDAY, *May* 17, 1898.

(*Extract from Minutes.*)

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS
vs.
JOSEPHINE R. WITHERS. } No. 666.

Ordered that the Honorable Charles Parlange, United States district judge for the eastern district of Louisiana, be, and he is hereby, designated to sit as one of the judges of this court on the hearing and determination of this cause.

Endorsed: Filed May 18, 1898. J. M. McKee, clerk.

Agreement as to Record.

U. S. Circuit Court of Appeals, 5th Circuit.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS, Plaintiff in Error,
vs.
JOSEPHINE R. WITHERS, Defendant in Error. } No. 666.

Error to U. S. circuit court, middle district of Alabama.

In this cause it is agreed that the postal card referred to in the agreement of counsel filed in this cause in the court below, set out on pages 16 and 17 of the printed transcript of said cause, was in words and figures as follows:

"Endowment rank, Knights of Pythias. Office board of control. Endowment rank, K. of P. H. B. Stolte, secretary. Chicago, Nov. 4th, 1895. Received of section No. 432 one hundred and thirteen and $\frac{30}{100}$ dollars, in payment of monthly payment and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt. H. B. Stolte, secretary board of control."

37 In the center was stamped the seal of such board of control.

The same was addressed to S. W. Chadwick, Greensboro, Alabama.

It is further agreed that the said postal having been omitted from the record made out by the clerk in this case, that this agreement may be inserted in said record and considered and treated as a part of the same, and that in deciding said case the court shall consider this agreement a part and parcel of the record thereof.

Witness our hands this 17th day of May, 1898.

THOS. G. & CHAS. P. JONES,
Att'ys for Pl'ff in Error.
H. C. TOMPKINS,
ED. DE GRAFFENREID,
C. E. WALLER,
Att'ys for Def't in Error.

November Term, 1897.

TUESDAY, *May* 17, 1898.

(*Extract from Minutes.*)

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS
vs.
JOSEPHINE R. WITHERS. } No. 666.

This cause was regularly called this day and was submitted to the court upon briefs of counsel heretofore filed.

38 November Term, 1897.

TUESDAY, *May* 24, 1898.

(*Extract from Minutes.*)

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS
vs.
JOSEPHINE R. WITHERS. } No. 666.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the middle district of Alabama, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Supreme Lodge of the Knights of Pythias, and the sureties on the writ of error bond herein, Edward A. Graham, Wade A. McBryde, and Jacob Greil, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

Opinion.

United States Circuit Court of Appeals, Fifth Circuit, November Term, 1897.

Filed May 24, 1898.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS *vs.* JOSEPHINE R. WITHERS. } No. 666.

Error to the United States circuit court, middle district of Alabama.

39 Before Pardee and McCormick, circuit judges, and Parlange, district judge.

By the COURT:

By agreement this case was practically tried in the court below by the judge upon an agreed state of facts. The judge rendered an elaborate opinion on the law of the case as applicable to the facts. The assignments of error are (1) that the court erred in instructing the jury to find a verdict for the plaintiff, with interest from the 5th day of November, 1895; (2) the court erred in refusing to instruct the jury at the instance of the defendant as follows: "If they believed the evidence they must find for the defendant."

These assignments of error amount to no more than the complaint that the judge erred in deciding the case. Counsel for plaintiff in error in their brief specifically point out the errors of law of which they complain. It would seem that they ought to have complied with our rule XI with regard to the assignment of errors. As there is no plain error apparent of record, we might well dismiss this writ of error upon this ground.

Among other matters of law the trial judge held that there had been no forfeiture of Withers' insurance, because Withers had promptly paid his monthly premium, and that this payment, with the payments of other members of the section and according to the course of dealing between the secretary of the section and the board of control, had been deposited in the post-office on the last day of the month of October, 1895. We concur with this finding.

Notwithstanding the provision in section 10 of the general laws, that the officers of sections are the agents of the members and shall in nowise be considered as the agents of the representatives of the board of control of the endowment rank or of the supreme lodge, we are of opinion that the secretary of the section was in fact the agent of the board of control to receive and forward the dues paid by the individual members—Whiteside *v.* Supreme Conclave, &c., 82
40 F. R., 275; Knights of Pythias *v.* Bridges, 39 S. W., 333, and see Insurance Co. *v.* Wilkinson, 13 Wall., 222, 234—and that when payment had been made by the insured under section 4 of the general laws to the secretary of the section the money so paid belonged to the board of control. Under a fair construction of sec-

tion 6 and of section 10 of the general laws, when the secretary of the section deposited in the post-office at Greensboro the moneys collected as the monthly payments and dues of the individual members of the section, and in this followed a long course of business, the said payments and dues were then and there received by the board of control—Buell *v.* Chapin, 99 Mass., 594; Gurney *v.* Howe, 9 Gray, 404—and as in this case the admitted facts show that the payments and dues were deposited by Chadwick, the secretary of the section, in the post-office at Greensboro on the 31st day of October, 1895, there was no forfeiture under section 6 of the general laws.

Campbell *v.* Supreme Lodge Knights of Pythias, 168 Mass., 397, does not conflict with this view of the case.

Other questions argued need not be considered.

The judgment of the circuit court is affirmed.

41 *Petition for Writ of Error.*

To the Honorable Edward Douglass White, justice of the Supreme Court of the United States:

The petitioner, The Supreme Lodge Knights of Pythias, respectfully represents and shows unto your honor that at the time of the suit hereinafter referred to it was and still is a corporation duly organized and existing under and by virtue of an act of Congress entitled "An act to incorporate the Supreme Lodge of the Knights of Pythias," approved June 29, 1894; which said act is in words and figures as follows, to wit: "Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That Geo. B. Shaw of the city of Eau Claire, State Wisconsin; Wm. W. Blackwell, of the city of Henderson, State of Kentucky; Walter B. Ritchie of the city of Lima, State of Ohio; Rob't L. C. White, of the city of Nashville, State of Tennessee; Philip T. Colgrove, of the city of Hastings, State of Michigan; and Tracy R. Bangs of the city of Grand Forks, State of North Dakota, officers and members of the Supreme Lodge Knights of Pythias, and their successors be and they are hereby incorporated and made a body politic and corporate in the District of Columbia by the name of 'The Supreme Lodge Knights of Pythias;' and by that name it may sue and be sued, plead and be impleaded in any court of law or equity, and may have and use a common seal, and change the name at pleasure, and be entitled to use and exercise all powers, rights and privileges incidental to fraternal and benevolent corporations within the District of Columbia." That on the third day of March, 1896, Josephine R. Withers commenced an action at law against petitioner in the circuit court of Hale county, Alabama, to recover the amount of a policy of insurance issued by defendant, in which said plaintiff was the beneficiary, as shown by the com-

42 plaint on pages 1, 2, 3, and 4 of the certified copy of the record in said cause, herewith filed and made part of this petition.

2. That, as appears from said certified record, petitioner, within

the time required by law, filed in said circuit court for Hale county, Alabama, its petition to remove said cause; that it appeared in and by the original complaint and by the petition in said cause that said action was a suit of a civil nature at common law, in which the matter in dispute exceeded, exclusive of interest or costs, the sum or value of two thousand ($2,000.00) dollars, and that the controversy therein arose under the Constitution and laws of the United States, and that petitioner was at the time of the institution of said suit and has ever since been and still is a corporation organized and existing under and by virtue of the laws of the United States. See pages 5 and 6 of the Certified Record.

That petitioner filed with said petition a proper bond, and that thereafter such proceedings were had that said cause was removed to the United States circuit court for the southern division of the northern district of Alabama, and by consent transferred from said last-mentioned court to the circuit court of the United States for the middle district of Alabama. See pages 7, 8, 9, 10 of the Certified Record.

3. That thereafter such proceedings were had in said circuit court that said cause was tried on the testimony and agreements of counsel, as shown by the bill of exceptions—see pages 10 to 27 of the Certified Record—and a judgment was rendered in said court in favor of the plaintiff and against the petitioner for the sum of three thousand three hundred ninety-two ($3,392.54) and $\frac{54}{100}$ dollars, besides costs. See pages 9 and 10 and pages 27, 28, 29, 30, and 31 of the Certified Record.

4. That thereafter petitioner applied for and obtained a writ of error from said judgment to the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana. See — 32-34
43 of the Certified Record. That thereafter such proceedings were had in the United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, that on, to wit, May 24th, 1898, said court rendered a judgment affirming all things — said judgment of the circuit court of the United States for the middle district of Alabama, hereinabove set out, and further directing that said petitioner and his sureties pay the costs of said cause. See pages 38 and 39 of the Certified Record.

That petitioner further shows unto your honor that the matter in controversy exceeds the sum of two thousand ($2,000.00) dollars besides costs, and that the controversy arose under the Constitution and laws of the United States.

Petitioner further shows unto your honor that said United States circuit court of appeals for the fifth circuit erred to the injury of petitioner in this:

1st. That said circuit court of appeals for the fifth circuit held that there had been no forfeiture of the certificate of insurance set out.

2. Said circuit court of appeals for the fifth circuit erred in holding that the secretary of the section of the Knights of Pythias at Greensboro, Alabama, was the agent of the board of control.

3. Said court erred in holding that the deposit of money in the

post-office at Greensboro, Alabama, by Chadwick, the secretary of the section, on October 31st was a payment to the board.

4. Said court erred in affirming the judgment of the circuit court of the United States for the middle district of Alabama.

Petitioner herewith tenders a certified copy of the record and proceedings of said United States circuit court of appeals for the fifth circuit, at New Orleans, Louisiana, and bond in the sum of six thousand dollars ($6,000.00), with sufficient surety, which said amount was fixed by agreement between counsel for petitioner and said Josephine R. Withers, defendant in error in said circuit court, and prays that your honor will approve said bond and grant petitioner a writ of error directed to said judges of said United States
44 circuit court of appeals, commanding and requiring them to certify the record and proceedings concerning the same to the Supreme Court of the United States, together with the writ of error, in order that justice may be done in the premises; and, as in duty bound, petitioner will ever pray.

THOS. G. JONES,
Attorney for Petitioner and Plaintiff in Error in Circuit Court of Appeals.

THE STATE OF ALABAMA, }
Montgomery County. }

Personally appeared before me, E. L. May, a notary public in and for said State and county, Chas. P. Jones, who is known to me, and who, being by — first duly sworn, deposes and says that he is one of the attorneys for petitioner in said above petition mentioned; that he has read said petition and knows the contents thereof, and that the same are true as therein set forth.

CHAS. P. JONES.

Sworn to and subscribed before me this third November, 1898.
[SEAL.]
E. L. MAY,
Notary Public, Montgomery County, Alabama.

Endorsed: Filed November 15, 1898. J. M. McKee, clerk.

45 *Bond for Writ of Error.*

Know all men by these presents that we, The Supreme Lodge Knights of Pythias, as principal, and The National Surety Company, a New York corporation, doing business in the State of Alabama, as surety, are held and firmly bound unto Josephine R. Withers in the full and just sum of six thousand ($6,000.00) dollars, to be paid to the said Josephine R. Withers, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this second day of September, in the year of our Lord one thousand eight hundred and ninety-eight.

Whereas lately, at a regular term of the United States circuit court of appeals for the fifth circuit, begun on the third Monday of

November, 1897, in a suit depending in said court between said Supreme Lodge Knights of Pythias and said Josephine R. Withers, a judgment was rendered against the said Supreme Lodge Knights of Pythias, said judgment being rendered on May 24th, 1898, affirming a judgment of the circuit court of the United States for the middle district of Alabama, dated July 6th, 1897, for the sum of $3,392.54, and the said Supreme Lodge Knights of Pythias having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Josephine R. Withers, citing and admonishing her to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date thereof:

Now, the condition of the above obligation is such that if the said Supreme Lodge Knights of Pythias shall prosecute said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

46 BOARD OF CONTROL, ENDOWMENT RANK, KNIGHTS OF PYTHIAS,

[SEAL.] By H. B. STOLTE, *Sect.*

[SEAL.] NATIONAL SURETY COMPANY.

ADAMS GOODRICH,
Resident Vice-President.

HENRY L. AYRES,
Resident Assistant Secretary.

Approved:

E. D. WHITE,
Associate Justice of the Supreme Court U. S.

Endorsed: Filed Nov. 15, 1898. J. M. McKee, clerk.

47 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing 47 pages, numbered from *a* to 46, contain a true, full, and perfect copy of the record in a cause lately pending in said court, wherein The Supreme Lodge of the Knights of Pythias was plaintiff in error and Josephine R. Withers was defendant in error, as the same appears of record and on file in my office.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 15th day of November, A. D. 1898.

J. M. McKEE,
Clerk of the United States Circuit Court of Appeals.

Endorsed on cover: File No. 17,217. U. S. C. C. of appeals, 5th circuit. Term No., 632. Supreme Lodge Knights of Pythias, plaintiff in error, *vs.* Josephine R. Withers. Filed December 12th, 1898.

No. 170.
Brief of Jones & Field for P. E.
Filed Jan. 10, 1900.

Office Supreme Court U. S.
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JAMES H. MCKENNEY
Clerk.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 170.

SUPREME LODGE KNIGHTS OF PYTHIAS,
Plaintiff in Error,
vs.
JOSEPHINE R. WITHERS,
Defendant in Error.

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR PLAINTIFF IN ERROR.

THOS. G. and CHAS. P. JONES,
ATTORNEYS FOR PLAINTIFF IN ERROR.
H. H. FIELD,
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The Gunthorp-Warren Printing Company, 53 Dearborn St., Chicago.

IN THE

Supreme Court of the United States.

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vs.

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In error to the United States Circuit Court of Appeals for the Fifth Circuit.

STATEMENT OF CASE.

This action was brought in a state court of Alabama to recover upon a certificate of membership for $3,000 issued by plaintiff in error, in which the defendant in error was named as beneficiary. The suit was removed into the Circuit Court of the United States, where, upon the trial, the defendant in error recovered a judgment which was affirmed in the Circuit Court of Appeals. (89 Fed. Rep., 160; 59 U. S. App., 177; 32 U. S. C. C. A., 182.) The case was then brought by writ of error to this court. The jurisdiction of this court was invoked upon the ground that the suit was one arising under the laws of the United States, as appears by the complaint of

the plaintiff below (Trans., p. 3), upon which ground the cause was removed to the Circuit Court (pp. 6-8), and, therefore, the judgment of the Circuit Court of Appeals was not final.

The Supreme Lodge Knights of Pythias, is a fraternal and benevolent society, incorporated by Act of Congress, approved June 29, 1894 (Ch. 119, 28 Stats., 96), as the successor of a former corporation of the same name organized under an Act of Congress approved May 5, 1870, relating to corporations in the District of Columbia. Its members compose the order of Knights of Pythias, and it is governed by a legislative body known as the Supreme Lodge Knights of Pythias, whose officers were the incorporators.

The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those members of the order who have taken out benefit certificates. Such members are admitted into local subordinate branches, known as sections. The members of each section elect their own president and secretary, and these sections are entirely distinct and separate from the subordinate lodges of the order. The endowment rank is governed by a board of control elected by the supreme lodge, which has entire charge of the affairs of the rank. The officers of the board are a president and secretary, and its place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the supreme lodge, and by rules and regulations adopted by the board of control and approved by the supreme lodge. (The general features of the endowment rank, as an organization, appear in *Knights of Pythias* v. *Kalinski*, 163 U. S., 289, but the particular by-laws in issue here were not involved in that decision.)

January 1, 1883, Robert W. Withers, a Knight of Pythias, made written application for membership in the endowment rank. In the application subscribed by him (Trans., 16–18), and which became a part of the contract of membership, he agreed, viz:

"*I will be governed and this contract shall be controlled, by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained.*" (p. 18.)

His application was accepted and he received certificates in the first and second classes, March 2, 1883, which he voluntarily surrendered, with a written application for transfer to the fourth class, August 13, 1885, and thereupon received certificate No. 11,072 in that class, for $3,000, dated September 29, 1885, upon which this suit was brought. (pp. 13, 14.)

This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were

"made a part of this contract, * * * and in consideration of the payment hereafter to said endowment rank of all monthly payments as required, *and the full compliance with all the laws governing this rank, now in force or that may hereafter be enacted, and shall be in good standing under said laws*, the sum of $3,000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, upon due notice and proof of death *and good standing in the rank at the time of death*, * * * and it is understood and agreed that any violation of the within mentioned conditions or the requirements of the laws *in force governing this rank*, shall render this certificate and all claims null and void and the said supreme Lodge shall not be liable for the above sum or any part thereof."

Withers was a member of section No. 432, at Greens-

boro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank (Trans., 14, 15), Withers was required to pay $4.90 monthly, in accordance with his age and the amount of his endowment. The law provided that such payments should be due and payable to the secretary of the section without notice, on the *first* day of each and every month; failure to make such payment on or before the *tenth* day of the month caused a forfeiture of the certificate and membership, but with the privilege of regaining membership by application and medical examination as in case of new members. (Trans., 14.)

The law governing the payment by the secretary of the section to the board of control at Chicago (Trans., 16) provided (Sec. 6) that he should forward to the board the monthly payments and dues collected *immediately* after the *tenth* day of each and every month, and further provided that

"If such payments and dues *are not received by the board of control on or before the last day of the same month*, the section so failing to pay, and all members thereof, shall stand suspended from membership in the endowment rank, and their certificates, and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section.

Provided, That the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all right as a section, and any surviving members thereof (not less than five), shall regain full rights and privileges held previous to such forfeiture, if within thirty days from the suspension of warrant, said section shall pay to the board of control the amount of all monthly payments, assessments and dues accrued upon said members."

"SEC. 10. Sections of the endowment rank shall be

responsible and liable to the board of control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of the members, and shall in nowise be considered as the agents or the representatives of the board of control of the endowment rank or of the supreme lodge."

It will thus be seen that the members were allowed ten days in which to make payment to the secretary, and the latter was required to forward his remittance for the section in time to be *received* by the board of control at Chicago on or before the *last* day of the same month, in default of which the section and all members thereof were suspended and their certificates forfeited, but with the privilege of the section as a whole, or any surviving members (not less than five), of becoming reinstated within thirty days, as provided. (p. 16.)

Withers made payment for October, 1895, to the secretary of his section prior to the 10th of the month. The secretary, however, failed to forward the remittance for the section for October in time to be received by the board on or before the last day of the month; but, on the contrary, the remittance was not mailed from Greensboro until November 1, although he claims to have deposited the letter containing it in the postoffice on the evening of October 31, but after the mails were closed for that day. (Trans., 11.) The envelope enclosing the remittance sheet dated October 31, 1895, and check, was received by the board of control November 4, 1895, and was postmarked "Greensboro, Ala., Nov. 1, 1895." (Trans., 15, 22.)

On November 1, 1895, no remittance from section No. 432 for October having been received by the board of

control, the secretary mailed Chadwick, the secretary of the section at Greensboro, a notice of the suspension of the section and all members thereof, under said section 6 of the laws of the rank. (Trans , 12; Ex. X; p. 15, 16.)

Withers was taken sick and died on November 1, 1895. On November 4, 1895, the remittance having been received by the board of control at Chicago, a postal card receipt was mailed to the secretary of the section, as follows (Trans., 15; Stipulation, pp. 32, 33):

"OFFICE BOARD OF CONTROL,
CHICAGO, Nov. 4th, 1895.

Received of Section No. 432 one hundred thirteen and 30/100 dollars in payment of monthly payment and dues for October, 1895, *on condition that all members for whom above payment is made were living at date of this receipt.*

H. B. STOLTE,
Sec'y Board of Control."

On November 5, 1895, the board received notice of Withers' death and declined payment of the certificate upon the ground that he was not in good standing in the rank at the time of his death, but, on the contrary, stood suspended with the section, whereby the certificate became forfeited. The October dues were returned to the secretary of the section. (Trans., 15.)

The case was tried before the District judge and a jury, upon the documentary evidence and agreed statements of the facts, and at the close of the evidence the court instructed the jury to find a verdict in favor of the plaintiff for the amount of the certificate and interest, to which ruling the defendant excepted, upon which verdict judgment was entered.

The errors assigned to the judgment of affirmance are not printed in the transcript, but are here set forth as the

Specification of Errors.

The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court, and in holding:

I. That there had been no forfeiture of the certificate sued upon.

II. That the secretary of the section was the agent of the board of control, contrary to the express provisions of the by-laws and contract of membership.

III. That the deposit of the remittance in the post office at Greensboro, October 31, 1895, was a payment to the board of control as of that date, contrary to the express provisions of the by-laws and contract of member ship.

ARGUMENT.

The decision of this case requires simply the enforcement of the plain terms and provisions of the contract of membership and the by-laws of the society governing the same. It is not the case of an ordinary "old line" policy of insurance, but a contract of membership between a certificate holder and the fraternal association of which he was a member, in which contract he expressly agreed to be "*governed and controlled by all the laws, rules, &c., of the association then in force, or that might thereafter be enacted.*"

I.

A member of a fraternal association is bound by, and presumed to know, the provisions of the constitution and by-laws of the association, and these enter into and form a part of the contract.

Bacon, Benefit Societies & Life Insurance, Secs. 69, 74, 81.

Niblack, Benefit Societies (2nd Ed.), Secs. 18, 136.

5 Thompson on Corporations, Sec. 5987.

5 Am. & Eng. Ency. of Law (2nd Ed.), 100.

3 *Ibid.*, 1059, 1081–3.

Such member is bound by, and is presumed to take notice of, all by-laws enacted by the society *after his admission*, where, as in this case, the application and certificate so provide.

Bacon, Benefit Societies, &c., Secs. 185, 188.

Niblack, Benefit Societies, &c. (2nd Ed.), Secs. 25-27, 137.

Korn v. *Society*, 6 Cranch, 192, 200; 7 *Ib.*, 396.

Pain v. *Societe, &c.*, 172 Mass., 319, 323.

May v. *Society*, 14 Daly (N. Y.), 389.

Supreme Commandery v. *Ainsworth*, 71 Ala., 436, 449.

Bogards v. *Ins. Co.*, 79 Mich., 440.

Hughes v. *Ins. Co.*, 98 Wis., 292, 297.

Bowie v. *Grand Lodge, &c.*, 99 Cal., 392.

Association v. *Severson*, 71 Conn., 719.

Supreme Council, &c., v. *Adams*, 44 Atl. Reptr. (N. H.), 380.

Fullenwider v. *Royal League, &c.*, 180 Ill., 621, 626.

These rules have been applied in the following cases against this defendant, involving similar contracts:

Supreme Lodge K. of P. v. *Knight*, 117 Ind., 489.

Same v. *LaMalta*, 95 Tenn., 157.

Same v. *Kutscher*, 179 Ill., 340.

Same v. *Trebbe*, 179 Ill., 348.

Daughtry v. *Knights of Pythias*, 48 La. Ann., 1203.

Dornes v. *Supreme Lodge K of P.*, 75 Miss., 466.

Lloyd v. *Supreme Lodge K. of P.* (U. S. C. Ct. App. 7th Cir., Dec. 1, 1899).

In the Circuit Court the decision was placed upon the ground that inasmuch as the member had made his pay-

ment to the secretary in due time, he was not chargeable with the failure of the secretary to forward the monthly remittance to the board of control within the time prescribed in the by-law. In the Court of Appeals the decision was placed upon the ground that a deposit of the money in the postoffice on the last day of the month was a payment to the board of control, and that notwithstanding the provision in section 10, the secretary was the agent of the board of control to receive and forward the dues paid by the individual members.

We contend that in both decisions, the plain, positive and unequivocal terms and provisions of the contract and by-laws governing the same, were ignored, with the result that a contract was forced upon the plaintiff in error entirely different from the one that had been in fact entered into with the member, in violation of the well-settled rule that parties may make their own contracts so long as no rule of public policy is violated thereby.

Granting that the member had made due payment to the secretary of the section, his continued good standing in the endowment rank was expressly conditioned upon the faithful compliance by the secretary with the law in regard to the making of the monthly remittance to the board of control at Chicago, and the liability of plaintiff in error was expressly conditioned upon the good standing of the member in the rank at the time of his death.

The courts have recognized a distinction between contracts of membership in a fraternal society and policies of life insurance issued by corporations conducted for profit, and the strict rules of law applicable to the latter do not apply. As to members of fraternal societies the terms of the contract are to be sought for in the applica-

tion and certificate and in their constitutions and by-laws, and the rights of members are governed accordingly. These societies are formed and carried on for the purpose of securing to the beneficiary of the member pecuniary relief or benefit upon his death, and not for profit. The members of such societies, as in this case, are restricted to those who belong to a certain order, or class, or employment, and in entering the society they mutually agree with each other to be bound by laws enacted by themselves, through their representatives, framed with a view of securing to all the equal benefits of their association; and where such laws violate no statute nor rule of public policy they are binding upon the members aud control the terms of the contract of membership.

5 Am. & Eng. Ency. of Law (2nd Ed.), 100.

In an association like this, where the revenues required for the payment of death losses are wholly derived from payments of members, there must, of necessity, be stringent provisions regulating the collection and payment of the assessments or dues of the members; otherwise the members or their sections will inevitably fall in arrears and the funds be not forthcoming for the payment of losses.

Niblack, Benefit Societies, etc., Sec. 285.

Such provisions are reasonable because they enjoin upon members not only the necessity of promptly paying their dues to the sections, but also the necessity of seeing and knowing that the secretaries make due payment to the board of control.

In *State* v. *Grand Lodge, etc.*, 78 Mo. App., 546, 557, the court said:

"This is, to a certain extent, a mutual insurance company, acquiring the revenue necessary to pay death losses from small periodical assessments on its numerous members scattered over the country. They cannot exist or meet the demand of legitimate losses unless permitted to adopt and enforce reasonable rules and regulations; and courts ought not to interfere with the administration of their affairs except on most cogent reasons."

In *Borgraefe* v. *Knights of Honor*, 22 Mo. App., 127, it is said, p. 142:

"The laws and rules governing the different branches of such an order are in the nature of contracts among all the members, and considering the widespread extent of these organizations, it is highly important, as a principle of public policy, that in cases of this kind their rules and regulations should be substantially upheld by the courts."

In *Carlson* v. *Supreme Council, etc.*, 115 Cal., 466, the court said:

"In mutual benefit societies, provision is almost invariably made in the charter, by-laws, or certificates of membership for assessments upon members for the payment of death losses, and for forfeiture of all rights of membership in case assessments are not paid in accordance with the rules and regulations. Such societies have no practical means of meeting their frequently recurring obligations except by the prompt collection of such assessments, and it has been found necessary to adopt stringent means to enforce their prompt payment."

In *Drum* v. *Benton*, 13 App. (D. C.), 245, 256, the court cited with approval the language of this court in *Insurance Co.* v. *Statham*, 93 U. S., 31, as to the necessity of provisions for a forfeiture in contracts of insurance, and applied the rule to the contracts of a fraternal association, saying:

"The necessity for the strict enforcement of the by-

laws, and the rigid adherence to the remedy by forfeiture for non-payment, is even more imperative in an association like the present than in the case of an ordinary life insurance company."

See, also, *Clark* v. *Association*, 14 App. (D. C.), 154, 174.

It was expressly made a condition of liability in the application and certificate that the member should be in good standing in the rank at the time of his death (p. 13, 18). The contract was not alone that he should duly make his payments to his section; he was further to be and remain in good standing in the rank. His good standing in the rank grew out of and depended upon his membership in the section, for it was only through such membership that he had any rights under his certificate. His membership in the section depended not only upon his own compliance with the laws, but upon like compliance by the section. If the section defaulted in its obligations and thereby became defunct or suspended, his membership fell with it. His own previous compliance with the laws secured his good standing in the rank, so long as his membership in the section continued, but no longer. When that terminated, from whatever cause, he was no longer a member of the rank. The section was the means and agency employed by him to secure the benefits of the rank. When his chosen agency defaulted and lost its connection with the rank his rights terminated. It is so written and provided in the laws by which he expressly agreed that his rights should be controlled. His contract, with the association, in brief, was, that if he should be in good standing in the rank through his membership in the section at the time of his death, the certificate should be paid, otherwise not. At the time of his

death his membership in the section had been lost because that organization had by its default terminated its and his connection with the endowment rank; hence he was not in good standing and there was no liability upon the certificate.

The law is well settled that such provisions are *self-executing* and require no affirmative action on the part of the association or its officers in declaring a forfeiture. The words "shall stand suspended from membership and their certificates shall be forfeited," are unambiguous and clearly imply an *ipso facto* termination of the contract of membership. Such words have repeatedly received this construction.

Niblack, Benefit Societies, &c. (2d Ed.), Sec. 289.

Bacon, Benefit Societies, &c., Sec. 385.

Borgraefe v. *Supreme Lodge, &c.*, 22 Mo. App., 127, 143.

Lehman v. *Clark*, 174 Ill., 279, 292.

Freckmann v. *Supreme Council, &c.*, 96 Wis., 133.

Rood v. *Association*, 31 Fed. Rep., 62.

Carlson v. *Supreme Council, &c.*, 115 Cal., 466.

Yoe v. *Association*, 63 Md., 86.

Supreme Lodge v. *Keener*, 6 Tex. Civ. App., 267.

Drum v. *Benton*, *supra*.

Unless, therefore, the plain provisions of the contract of membership and the by-laws are to be disregarded and other terms substituted, the deceased was not, at the time of his death, a member in good standing in the endow-

ment rank, but on the contrary his membership and certificate had become forfeited. Whatever hardship may result, the rights of the beneficiary—which rest in the contract between the deceased and the defendant—must be ascertained and controlled by the plain terms and provisions thereof.

Campbell v. *Supreme Lodge, K. of P.*, 168 Mass., 397, was a case arising upon substantially the same facts and involved the same provisions in the contract and by-laws. Campbell (the member) had made due payment to the secretary for the month of February, 1895, but the secretary had failed to forward the collections for that month within the time prescribed by the by-laws. On Friday, March 1st, he mailed the remittance to the board of control at Chicago. The letter was received at the Chicago postoffice on Sunday, March 3rd, at 4 A. M., and was delivered by a mail carrier at the office of the board of control on the morning of Monday, March 4th. The board on the same day sent a receipt for the money, expressed to be on condition that all the members for whom the payment was made *were alive at the date of the receipt*. Campbell died on Sunday, March 3rd, at 10 A. M. The court held, upon consideration of the provisions of the same by-laws, that Campbell had become suspended as a member and his rights forfeited, prior to the time of his death, because of the failure of the secretary to forward the remittance in time to be *received* at the office of the board on the last day of February; and that he did not become reinstated by the mailing of the money by the secretary prior to his death and within the time prescribed in the by-laws for reinstatement of living members of the section.

In that case it was expressly held that the money must

be actually *received* by the board of control on or before the last day of the month; otherwise, the section and all members thereof stand suspended after that date, and that the fact that the money was actually deposited in the post-office and in transmission prior to the member's death, was not sufficient to save the forfeiture.

A distinction was sought to be drawn in the brief of counsel for defendant in error and in the opinion of the court below, between the *Campbell* case and the one at bar. It was claimed by counsel that the court did not consider the provision in regard to the payment by the member to the secretary on or before the 10th day of the month. This was not the case, but it was immaterial because it was conceded, as here, that the member had made due payment to the secretary, whose duty it was to collect the payments from the members and forward them to the board of control. The only difference between the cases is that in the *Campbell* case the remittance was not mailed or forwarded until the *first* day of the following month, while in this case the remittance was deposited in the postoffice on the last day of the month, but after the mails had closed for that day. This difference is not important, because, as the court held, it was not the time of *forwarding* the remittance, but the time it was *received* by the board of control at Chicago, that determined the question of forfeiture, and it was held that under the plain provisions of the by-laws the remittance must actually be received on or before the last day of the month, otherwise the member stands suspended with his section.

By-laws providing for a forfeiture of indvidual membership upon the suspension of a subordinate lodge have frequently been sustained by the courts. The membership is attached to the subordinate branch, and the mem

ber must trace his relationship to the grand or supreme lodge through his membership in the subordinate branch. When that ceases, it *ipso facto* terminates his contract relations with the grand or supreme lodge.

In *Young* v. *Grand Lodge Sons of Progress*, 33 Atlantic Reporter, 1038; 173 Pa. St., 302, the by-laws were almost identical with those in this case. The subordinate lodge collected the assessments for the endowment fund from the members upon the requisition of the grand lodge, and forwarded them to the secretary of that body The constitution provided that "lodges not complying with this law within thirty days from date of notice of the death of a member shall forfeit their claim on the endowment fund," etc. The plaintiff had paid his dues to the lodge and was in good standing therein. The plaintiff recovered because certain other provisions of the by-laws as to suspension and reinstatement had not been complied with, but the by-law above referred to was sustained by the trial judge, Thayer (whose opinion was adopted by the Supreme Court), in the following language:

"Doubtless the position assumed by the defendants, that the right of the members of the lodges which constitute the order, to participate in the endowment fund depends upon the compliance of the lodges to which they severally belong with the requirements of the constitution as to collecting and forwarding assessments, of which they are duly notified by the grand lodge, is correct; for section 9 of article 9 expressly provides that the claims of a defaulting lodge upon the endowment fund—that is, of the members of a defaulting lodge, for the lodge, as a lodge, in its collective capacity, can have no such claims—may be forfeited by a non-compliance by the lodge with the requirements of the constitution. The reason of the provision is that the subordinate lodges are the instruments by which the treasury of the endowment fund is

replenished, and by means of which, alone, the grand lodge is enabled to make good its undertaking to pay the members of the order the sum allotted to each by the constitution upon the occurrence of a death. If the lodges are careless or delinquent in collecting and forwarding to the grand lodge the assessment, the treasury of the endowment fund is crippled, and may be unable to meet the just demands made upon it. *The object of the provision is evidently to impose upon the members of each subordinate lodge the duty of seeing that their officers comply with the requisitions for assessments made by the grand lodge.* Hence, the claims of the members upon the endowment fund are made to depend upon the fidelity of the several lodges to which they belong in obeying the requisitions of the grand lodge for assessments, and in promptly forwarding the proceeds. *Being thoroughly understood by the members, it is neither an unjust nor an unwise provision.*"

In *Peet* v. *Knights of Maccabees*, 83 Mich., 92, plaintiff's intestate was a member of a subordinate tent of the order of defendant. The great camp made assessments and required the local tents to collect them from their members and hold them until called for by the great camp. An assessment was called for (No. 23) and another (No. 24) was ordered, May 1, 1888. Peet paid No. 24 May 31, 1888, and the finance keeper of the tent forwarded same June 5, 1888. On the same day, No. 25 was called for. The finance keeper did not charge this to Peet and failed to notify him of it. He failed to notify the great camp of the members who failed to pay 25, as he should have done, and when the assessment was called for he did not forward it to the great camp and the tent was suspended. September 25, 1888, Peet died *and afterwards the tent was reinstated.* One of the by-laws of the great camp was that

"*The subordinate tent shall be the agent of its members in the transmission of all dues and assessments to the*

great camp, and the great camp will in no case be liable for any default or negligence on the part of a subordinate tent, or its officers, in such transmission, etc."

It was held that the by-law was binding and that the certificate of the member was forfeited at the time of his death.

In *Dunn* v. *Relief Association*, 44 Atlantic Reporter, 484 (N. H.), the by-laws provided that to retain membership in the association the member must be in good standing in his lodge and that should he be suspended from his lodge his membership in the association immediately ceased. Dunn was a member of a lodge and was suspended from the membership therein. After his suspension he paid the association all the assessments that were made until his death, which the association received in ignorance of the knowledge that he had been suspended from his lodge; upon learning that fact they sent him a draft, which was returned. The insurance feature of the association was entirely distinct from the business of the lodges (as in this case). The court held that by the very terms of the contract the liability of the association was terminated when Dunn was suspended from his lodge.

In *McClure* v. *Supreme Lodge, &c.*, 59 N. Y. Supp., 764; 41 App. Div., 131, the court held that provisions for suspension of the subordinate lodge, and forfeiture of the rights of its members, for nonpayment to the supreme lodge, were effective notwithstanding the individual member was not in default, if there had been no acts of waiver by the supreme lodge. In that case the local lodge had habitually delayed its payments to the supreme lodge, and the latter had *made no complaint and given no notice or intimation* that a suspension would follow such delinquencies. In the case at bar a notice of

suspension was invariably given when there was a delayed remittance from the section.

In *Scheu* v. *Grand Lodge, etc.*, 17 Fed. Rep., 214, the deceased had not paid his assessment to the subordinate lodge but the latter had paid it for him to the grand lodge, and it was therefore held that the member was in good standing inasmuch as he had not been suspended by the subordinate lodge; but it was said that if the intestate had, in fact, been suspended by the subordinate lodge for the non-payment of the assessment at the time of his death, the plaintiff was not entitled to recover. The by-law in that case required affirmative action on the part of the lodge in suspending a member, and was not self-executing as in this case.

In *Hall* v. *Supreme Lodge*, 24 Fed. Rep., 450, the court recognizes the binding effect of provisions for suspension of subordinate lodges, but held that under the particular facts of that case notice of the assessments from the supreme lodge to the subordinate lodges was a condition precedent to the right of suspension, and if the supreme lodge failed to conform to its laws in regard to the giving of notices the rights of members of the subordinate lodge were not affected.

In *Supreme Lodge* v. *Abbott*, 82 Ind., 1, there was a provision that

"Any lodge failing, neglecting or refusing to forward the assessment to the supreme treasury within thirty days from the date of notice, *should stand suspended*, and that if a death occurred in the lodge during such suspension, no death benefit should be paid."

The court construed this language to mean that no death benefits would be paid *during the time of suspension*, but that if the lodge was reinstated, the rights to

death benefits, which were suspended with the suspension of the lodge, were restored with its reinstatement. The court recognized the validity of a provision that a member lost his rights by the suspension of his lodge, but the particular language of the by-laws was construed as stated.

In the following cases the by-laws were similar to that in the case last cited, and were given the same construction:

Supreme Lodge v. *Turner*, 47 So. Westn. Reptr., 44: (Tex. Civ. App).

Washington Camp v. *Association*, 8 Pa. Dist. Rep., 198.

Contrast the language of the by-laws in these cases with that in this case and the decisions sustain our contention. The by-law under consideration expressly provides that "the section so failing to pay, *and all members thereof*, shall stand suspended, etc., *and their certificates*, etc., *shall be forfeited.*"

In *American Council* v. *National Council*, 43 Atl. Reptr. (N. J.), 2, the by-law providing for suspension of the subordinate lodge, was not, as in this case, self-executing, but required action by the national council.

In *Davidson* v. *Supreme Lodge*, 22 Mo. App., 263, 275, this identical by-law as to suspension of the section was involved, and incidentally, applied.

II.

The provision in section 10 (Trans. p. 16), that officers of sections are the agents of the members and shall in no-wise be considered as the agents or the representatives of the board of control of the endowment rank, or of the

supreme lodge, was valid and binding upon the deceased under his contract of membership.

Under the rule that members of a fraternal society are mutually bound by the provisions of the constitution and by-laws which they are presumed to know, it is competent to provide that the subordinate lodge, and its officers, shall be the agents of the members, and not of the supreme lodge. Such provisions are to be construed so as to give effect to the plain terms of the contract of membership, and the strict rules of agency applicable to ordinary insurance companies, having no such provisions in their contracts, do not apply. In this connection, it is to be borne in mind that the sections of the endowment rank are entirely distinct from the local lodges of the Order of Knights of Pythias, and although such lodges may, under certain circumstances, be considered as agents of the supreme lodge in matters relating to the membership of the order, that rule does not apply to the sections of the endowment rank. The general rule is, as heretofore stated, that by-laws are to be enforced unless they are contrary to some statute or rule of public policy.

It is not claimed that there is any statute contravening this provision; neither is there any rule of public policy forbidding it. On the contrary, such provisions are sustained by public policy as being for the interests of all the members of the society. This case is a proper one for the application of the rule that courts should "not lightly interfere with the freedom of contract" under the guise of enforcing a supposed rule of public policy.

Ins. Co. v. *Ry. Co.*, 175 U. S., 91, 106.

The members of a section elect their own officers, and if those officers neglect their duties, the remedy lies en-

tirely with the members, who can best observe and correct any delinquencies. The provision that officers shall be deemed the agents of the members, and not of the board of control, or of the Supreme Lodge, violates no rule of public policy, is a reasonable one and calculated to secure a faithful discharge of duty. When such a provision is a part of the contract it is the duty of the courts to enforce it, rather than to substitute a different contract.

In *Susquehanna Ins. Co.* v. *Perrine*, 7 Watts & Serg., 348, it was held that a party who became a member of a mutual insurance company was bound by all of its by-laws and by one which provided that a surveyor of the company should be his agent for the purpose of making a description of the property, and that he would be held responsible for the correctness of the application.

A similar provision has been upheld in the following cases:

Peet v. *Knights of Maccabees*, 83 Mich., 92.

Grand Lodge, etc., v. *King*, 10 Ind. App., 639, 649.

Sovereign Camp v. *Rothschild*, 40 S. W. Reptr. (Tex.), 553.

Expressions may be found in a few decisions to the effect that subordinate lodges, and their officers, are agents of the supreme lodge, but these views were expressed in cases where there was no provision to the contrary, as in this case. All authorities agree that the provisions of the constitution and by-laws are to be enforced, and that where these fix the relationship they must control.

Bacon on Benefit Societies, Sec. 426.

Thus, in *O'Connell* v. *Supreme Conclave, etc.*, 102 Geo., 143, the court said:

"Whether the act of an officer of a subordinate lodge of a given order is, in a particular instance, binding upon the 'supreme conclave' of the same order, *depends upon the relation of the former to the latter, as defined by its constitution and by-laws and upon what is therein provided;* and this being so, it cannot, in the absence of necessary information on these points, be intelligently determined whether or not the payment of an assessment to an officer of the subordinate lodge would, in legal contemplation, be a payment to the 'supreme conclave.'"

Officers of subordinate lodges have no power to waive the provisions of the laws of the association that relate to the substance of the contract

McCoy v. *Ins. Co.*, 152 Mass., 272, 275.
Harvey v. *Grand Lodge*, 50 Mo. App., 472, 477.
Curtin v. *Grand Lodge*, 65 *ib.*, 294.
Grand Lodge, &c. v. *Connolly*, 43 Atl. Rep. (N. J.), 286.
Cannon v. *Ass'n*, 43 *ib.* (N. J.), 281, 285.
Ins. Co. v. *Foote*, 79 Ill., 361, 369.
Loeffler v. *Modern Woodmen*, 100 Wis., 79, 85.

In the *Loeffler* case the by-laws provided that no officer was authorized or permitted to waive any of the laws of the order which related to the substance of the contract between the member and the order. This by-law was passed *subsequent to the admission of the plaintiff*. It was held that under the terms of his contract, which bound him to comply not only with the laws then in force, but with *such as might thereafter be adopted*, he was bound by this provision.

The distinction between stock corporations and associations organized on the mutual principle, or fraternal associations which are governed by by-laws adopted by members through their representatives, is well recognized by the courts. See cases cited on page 12, *ante*, and,

Baxter v. *Ins. Co.*, 1 Allen, 294, 297.
Brewer v. *Ins. Co.*, 14 Gray, 203, 209.
Hale v. *Ins. Co.*, 6 Gray, 169.
Miller v. *Ins. Co.*, 42 N. J. Eq., 459.
Ins. Co. v. *Foote*, 79 Ill., 361, 369.
McCoy v. *Ins. Co.*, 152 Mass., 275.

The three decisions relied upon by the Court of Appeals to sustain its conclusion that this provision was ineffectual, are readily disposed of.

In *Whiteside* v. *Supreme Conclave*, 82 Fed. Rep., 275, it appeared that the collector for the subordinate body had been in the habit of extending the time in which the assessments were required to be made by the by-laws and that this practice was known to the officers of the Supreme Conclave; upon these facts the court held that it was a question for the jury whether the provision in the by-laws had not been waived by a course of dealing and practice in variance with its provisions.

In *K. of P.* v. *Bridges*, 39 S. W. Rep., 333 (Tex. Civil App.), it was held by an inferior appellate court in an action against this same defendant, that the knowledge of the officers of the local section that a member had become addicted to the use of intoxicating liquors was the knowledge of the supreme lodge. In that case the death occurred prior to the enactment of section 10 containing the provision hereinbefore referred to, and it was not involved. The decision while not an authority upon the question here involved seems to be in conflict with other decisions of the courts of Texas.

Sovereign Camp v. *Rothschild*, 40 S. W. Rep., 553: In that case the court gave effect to a precisely similar provision in the by-laws and held that the officers of the subordinate camp could not bind the sovereign camp by proceeding in a manner not authorized by the by-laws, and this decision was adhered to upon motion for rehearing and fully sustains our contention.

See, also,

Fitzmaurice v. *Ins. Co.*, 84 Tex., 61.
Hutchinson v. *Ins. Co.*, 39 So. West. Reptr. (Tex.), 325.

Insurance Co. v. *Wilkinson*, 13 Wall., 222, was the case of an ordinary policy of life insurance where the general principles of agency were applied and there was no provision like the one here involved. The case is, therefore, inapplicable.

There are decisions of this court and of the Circuit Courts of Appeals which clearly recognize and enforce the binding effect of a provision in the contract or policy, to the effect that the agent shall be considered the representative of the insured, and not of the company. This is not the case of an agent held out to the public without notice of a limitation of his authority, but a case where, *by the express provisions of the by-laws of the association to which the deceased belonged, and by which his rights were controlled*, the relationship between the section and its officers and the endowment rank was limited and defined.

In *Insurance Co.* v. *Fletcher*, 117 U. S., 519, there was a provision in the application that no statements or representations made, or information given, to the persons soliciting or taking the application for the policy

should be binding on the company or effect its rights, unless they were reduced to writing and presented to the home office in the application. The plaintiff claimed that the agents soliciting the insurance had full information as to the condition of health of the applicant and that their knowledge was the knowledge of the company. This court, however, enforced the provision contained in the application and held that the company like any other principal could limit the authority of its agents and thus bind all parties dealing with them *with knowledge of the limitation.* The court held that the case was very different from *Insurance Co.* v. *Wilkinson*, *supra*, in that the insured had direct notice of the limitation in the contract of the authority of the agent.

The same subject was presented and discussed in an exhaustive opinion by Mr. Justice Harlan presiding in the Circuit Court of Appeals, Sixth Circuit, in *Maier* v. *Fidelity Mutual Life Association*, 47 U. S. App., 329; 78 Fed., 566. In that case the application provided that no verbal statement by whomsoever made could modify the contract or in any manner affect the rights of the association, unless the same was reduced to writing and presented to and approved by the officers of the association at the home office, no agent or examiner having any authority or power to make or alter contracts, waive forfeitures, or grant credit. The court quoted from the opinion in the *Fletcher* case, *supra*, at great length, including that portion distinguishing the *Wilkinson* case, and also reviewed the decisions of the Supreme Court of Michigan, in which state the contract was made, and held that the provision in the application became a part of the contract and binding upon both parties thereto; the court said:

"Such was the contract between the parties, and there is no reason in law or in public policy why its terms should not be respected and enforced in an action on the written contract. It is the impression with some that the courts may, in their discretion, relieve parties from the obligations of their contracts, whenever it can be seen that they have acted heedlessly or carelessly in making them, but it is too often forgotten that in giving relief, under such circumstances to one party, the court may enforce a contract which the other party did not make or intend to make."

The same conclusion was reached by the same court in *Insnrance Co.* v. *Smith*, 92 Fed. Rep., 503; (U. S. App.,) where the above decisions were reviewed and the *Fletcher* case distinguished in an opinion by Lurton, circuit judge, and in the following:

Hubbard v. *Association*, 80 Fed. Rep., 681, 685.

Bernard v. *Association*, 43 N. Y. Supp., 527; 14 App. Div., 142.

Rohrbach v. *Ins. Co.*, 62 N. Y., 47.

McCoy v. *Insurance Co.*, 152 Mass., 272.

Quinlan v. *Ins Co.*, 133 N. Y., 356, 364.

These decisions were, it is true, based upon the express provisions of the applications; but in view of the settled rule, heretofore stated, that a member of a fraternal association is bound by the provisions of the constitution and laws of the association to the same extent as if specifically incorporated in the contract, the decisions are authoritative upon this question. Indeed, the reason is stronger, if possible, why such a member should be bound by such provisions which are an integral part of his contract of membership, and are essential for the protection of his fellow members. It logically follows from

these decisions that the provision of the by-law in question, of which the deceased must conclusively be presumed to have had knowledge, was valid and must control his rights under the contract of membership.

III.

In holding that a deposit of the letter containing the remittance in the mail at Greensboro on the last day of the month, constituted a payment to the board of control as of that date, the Circuit Court of Appeals ignored and nullified the plain provisions of the by-laws, which should control the contract.

The same question arose in *Campbell* v. *Knights of Pythias*, 168 Mass., 397, and the court enforced the provisions of the by-law, holding that the money was not *paid* to the board of control until it was *received* at its office in Chicago.

In many cases the provisions of the contract of insurance provide for or recognize the mailing of a remittance as a sufficient payment, especially where it is shown that it has continued so long as to constitute a practice or course of business on the part of the company.

Kenyon v. *Association*, 122 N. Y., 247, 262.

Van Bokkelen v. *Association*, 90 Hun, 330.

Kendrick v. *Ins. Co.*, 32 So. East. Rep. (N. C.), 728.

This, however, is not such a case, *first*, because the by-law itself plainly provides that the money must be *received* at the office of the board of control on or before the last

day of the month, otherwise the section, and all its members, shall stand suspended; and, *second*, the practice and course of business, as shown by the record, was, that whenever the remittance was delayed, notice of suspension was sent to the section, and when the remittance was actually received, the receipt was so conditioned as to effect the reinstatement of only *surviving* members of the section.

The district judge placed undue stress upon the provision in section 6 that the secretary shall *forward* to the board of control the remittance immediately after the tenth day of each month. If this provision stood alone the reasoning of the learned judge might be persuasive, as it could then be claimed that if the remittance was *forwarded* within a reasonable time a forfeiture would be avoided, but the provision is qualified and controlled by the subsequent provision that if the payment and dues are not *received* by the board on or before the last day of the same month the section and all members thereof shall stand suspended from membership, etc. This provision absolutely controls as to the *time* when the payment shall be made to the board of control, *i. e.*, it must be *received* on or before the last day of the month. No plainer language could have been used in prescribing the time when such payment was required in order to save a forfeiture.

The fact that it was the custom to send the remittance by mail does not alter the case. *Campbell* v. *Knights of Pythias*, *supra*. Unless the money is *received* on the last day of the month, there is no payment. This is further shown by the fact that by one of the rules contained on the remittance blank (p. 23) it is provided that where a bank draft is sent "the credit given the section *on the day of its receipt* is subject to the payment of the draft by the bank upon which it is drawn."

Waiver.

There is no question of waiver in this case. It is shown that whenever the remittances were delayed the board promptly mailed to the secretary notice of the suspension. No specific instances are shown where the remittances were received after the last day of the month, except that in possibly three or four of the instances referred to (Trans., p. 12), the remittances could not have reached the board on the last day of the month. There was, therefore, no waiver by the board of the provision requiring that the remittance should be *received* on the last day of the month. In this instance notice of suspension was mailed to the secretary on November 1st. (Trans., p. 12; exhibit X.)

Such delayed remittances were, of course, always accepted because the section had thirty days in which to regain its membership after a suspension, and the board was bound to accept the money for surviving members when received, under section 6 (p. 16), but the receipts given for the remittances were upon the express condition that all members *were living at the date of receipt*, and such was the receipt in this instance. (Stip., p. 32.)

It is well settled that where a member is permitted to become reinstated after a forfeiture, within a certain time, there must be a compliance with the conditions of payment, etc., *within his lifetime*, and that if he dies, although before the time expires, the forfeiture or suspension stands and cannot be avoided by a payment made by his beneficiary or other person in his behalf. The offer on the part of the society is to reinstate *a living, not a deceased* member.

Carlson v. *Supreme Council*, 115 Cal., 466.
Supreme Lodge, &c., v. *Keener*, 6 Tex. Civ. App., 267, 272.
Bacon, Benefit Societies, Sec. 385, *b*.
Niblack, Benefit Societies (2nd Ed.), Sec. 292.

There can be no waiver where the member dies in the interim between the date of suspension and the date of reinstatement.

Schmidt v. *Modern Woodmen*, 84 Wis., 101.
Ass'n. v. *Miller*, 85 Ky., 88.
Reichenbach v. *Ellerbe*, 115 Mo., 588.
Garbutt v. *Ass'n.*, 84 Ia., 293.
Maginnis v. *Ass'n.*, 43 La. Ann., 1136.
Bagley v. *Grand Lodge*, 31 Ill. App., 618.

It was stated in the brief for defendant in error in the court below that:

"It had been the habit of the secretary of the section for several years to mail his remittance to the board too late to reach Chicago until after the 1st of the month."

This statement is not justified by the record; there is nothing shown except as to the remittances for a year prior to this instance. Of the twelve remittances shown, *eight* were sent in time to have reached the board on the last day of the month, in ordinary course of mail, and there is no proof to the contrary. (Trans., p. 12.) The distance from Chicago to Greensboro is about nine hundred miles. In this case the letter mailed on the 1st probably arrived at Chicago on the 3rd, which was Sunday.

Again it was stated that the board had never notified

the officers of the section of such delinquencies, but it appears that whenever the remittance arrived after the last day of the month, notice of suspension was invariably forthwith sent the section, as in this case. (Trans., p. 12; Exhibit X; p. 15.)

In *Rice* v. *Grand Lodge*, 103 Iowa, 643, it was held that the mere fact that payments had been made and received in many instances after they were due, did not constitute a waiver where the lodge was bound to accept them when paid.

In *French* v. *Ins. Co.*, 169 Mass., 510, the court said:

"The fact that on former occasions late payments had been accepted had no effect in waiving the defendant's rights, since the forms of reinstatement always were insisted upon, and even an agreement that there should be no waiver was required in each case."

To the same effect are:

Crossman v. *Ass'n.*, 143 Mass., 435.
Yoe v. *Association*, 63 Md., 86.

The board had no knowledge of Withers' death at the time the remittance was received and the receipt mailed, and by such receipt it expressly excepted members not then living. Under such circumstances there could be no waiver of the forfeiture. To constitute a waiver there must exist the element of knowledge on the part of the party against whom a waiver is claimed; if this is wanting no waiver can be asserted.

In the opinions of the courts below it was sought to distinguish the case from *Campbell* v. *Knights of Pythias*, 168 Mass., 397, particularly because of the language near the close of the opinion, viz.:

"In the previous instances of delayed payments and waiver, the waiver took effect apparently from the day of

the actual receipt of the money by the board of control. No instance is mentioned where a member died between the time when the money was mailed and the time when it was received."

The latter sentence shows that the court was speaking of an alleged claim of waiver because of the fact *that remittances had been delayed in many instances*, but in those instances it did not appear that any member *had died between the time when the money was mailed and the time when it was received*, and it is not shown in this case that there was any instance where a member had died in the interim between the mailing and the receiving of the remittances; therefore there is no foundation for the claim of waiver.

If in the *Campbell* case, or in this case, repeated instances had been shown where members had died *after* the money had been mailed but before it had been received, and, notwithstanding, the board had accepted and retained the money, then it might have been claimed that such a course and practice of doing business constituted a waiver of the forfeiture, but such contention has no foundation upon this record.

Where the receipts recite that the money is accepted upon the express condition that a member is living, or is in good health, or that the policy is not in force during the period of the default, there is no waiver arising from the receipt and retention of the money.

Bryan v. *Association*, 42 Atlantic Reporter, (R. I.), 513.

Carlson v. *Supreme Council*, 115 Cal., 466.

There is nothing in *Knights of Pythias* v. *Kalinski*, 163 U. S., 289, that conflicts with these contentions. That case was decided upon questions that are not involved here, and upon the ground that the officials of the order were estopped from insisting upon a forfeiture because by the laws governing the endowment rank it was made the duty of the secretary of the section to obtain information as to whether the member was in good standing in his lodge, and the decision was largely controlled by a ruling of the board of control construing the laws involved. There was no provision at that time to the effect that secretaries of sections were the agents of the members and not of the board of control, or of the supreme lodge, and it further appeared that there had been a waiver by the continued receipt of assessments after the forfeiture.

The court recognized the fact that, as the endowment rank was a separate and distinct feature from the lodges, the member might have been ignorant of the fact that a failure to pay his *lodge dues* forfeited his certificate in the endowment rank. In this case a forfeiture is not claimed because of any failure to comply with any laws regulating the relations of the member to his *lodge*, but by reason of specific provisions in the law governing sections of the endowment rank of which the deceased was a member.

It is respectfully submitted that the judgments below should be reversed and a new trial awarded.

THOS. G. and CHAS. P. JONES,
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H. H. FIELD,
Of Counsel.

SUPREME LODGE KNIGHTS OF PYTHIAS,
Plaintiff in Error,
vs. No. 170.
JOSEPHINE E. WITHERS.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF ON QUESTION OF JURISDICTION.

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Attorneys for Plaintiff in Error.

EDWARD DE GRAFFENRIED,
Attorney for Defendant in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

SUPREME LODGE KNIGHTS OF PYTHIAS, PLAINTIFF IN ERROR, v. JOSEPHINE R. WITHERS.	*No.* 170.

In Error to the United States Circuit Court of Appeals for the Fifth Circuit.

SUPPLEMENTAL BRIEF ON QUESTION OF JURISDICTION.

I.

The original Supreme Lodge Knights of Pythias was first incorporated under the Act of Congress of May 5, 1870 (16 Stats. 101), relating to corporations in the District of Columbia.

The present Supreme Lodge exists solely under the Act of Congress approved June 29, 1894 (28 Stats. 96, Ch. 119), which reads as follows:

"An Act to incorporate the Supreme Lodge of the Knights of Pythias.

"*Be it enacted by the Senate and House of Representa-*
" *tives of the United States of America in Congress*
" *assembled*, That George B. Shaw, of the city of Eau
" Claire, State of Wisconsin; William W. Blackwell, of
" the city of Henderson, State of Kentucky; Walter B.
" Richie, of the city of Lima, State of Ohio; Robert L.
" C. White, of the city of Nashville, State of Tennessee;
" Philip T. Colgrove, of the city of Hastings, State of
" Michigan; and Tracy R. Bangs, of the city of Grand
" Forks, State of North Dakota, officers and members of
" the Supreme Lodge Knights of Pythias, and their
" successors, be, and they are hereby, incorporated and
" made a body politic and corporate in the District of
" Columbia by the name of 'The Supreme Lodge Knights
" of Pythias;' and by that name it may sue and be sued,
" plead and be impleaded in any court of law or equity,
" and may have and use a common seal, and change the
" same at pleasure, and be entitled to use and exercise
" all the powers, rights, and privileges incidental to
" fraternal and benevolent corporations within the District
" of Columbia.

" SEC. 2. That the said corporation shall have the
" power to take and hold real and personal estate, not
" exceeding in value one hundred thousand dollars, which
" shall not be divided among the members of the corpora-
" tion, but shall descend to their successors for the pro-
" motion of the fraternal and benevolent purposes of said
" corporation.

" SEC. 3. That all claims, accounts, debts, things in
" action, or other matters of business of whatever nature
" now existing for or against the present Supreme Lodge
" Knights of Pythias, mentioned in section one of this
" Act, shall survive and succeed to and against the body
" corporate and politic hereby created: *Provided*, That
" nothing contained herein shall be construed to extend
" the operation of any law which provides for the ex-
" tinguishing of claims or contracts by limitations of time.

" SEC. 4. That said corporation shall have a constitu-
" tion, and shall have power to amend the same at pleasure:

" *Provided*, That such constitution or amendments thereof " do not conflict with the laws of the United States or of " any State.

" SEC. 5. That said corporation shall not engage in " any business for gain; the purposes of said corpora- " tion being fraternal and benevolent.

" SEC. 6. That Congress may at any time amend, alter, " or repeal this Act."

II.

The entire corporate existence of the Order is hence merged into the single " body politic and corporate " created by the act of 1894, and the property, rights and obligations of the former corporation are, by this statute, placed by succession with the " body politic and corpo- " rate hereby created." It therefore exists, and exists only under this law of the United States, which is in no sense general, but particular and specific in creating this corporation. Judicial controversies in which it is a party, therefore, necessarily involve a law of the United States. In *Osborn* v. *United States Bank* (9 Wheat. 738, 823), this rule was first announced and is plainly pertinent and applicable to the corporation Plaintiff in Error herein, viz :—

" The charter of incorporation not only creates it, but " gives it every faculty which it possesses. The power " to acquire rights of any description, to transact busi- " ness of any description, to make contracts of any de- " scription, to sue on those contracts, is given and meas- " ured by its charter, and that charter is a law of the " United States. This being can acquire no right, make " no contract, bring no suit, which is not authorized by a " law of the United States. It is not only itself the mere " creature of a law, but all its actions and all its rights " are dependent on the same law. Can a being, thus con-

" stituted, have a case which does not arise literally, as " well as substantially, under the law? "

This ruling in *Osborn* v. *Bank* was the foundation of the like ruling in the *Pacific Railroad Removal Cases* (115 U. S. 1). The railroad corporations there involved were creations of federal statute alone, precisely as is the corporation at bar. Were the act of 1894 repealed, it is plain the Supreme Lodge Knights of Pythias would have no corporate existence whatsoever.

III.

The provision of the charter of the Order, whereby it is created a body politic and corporate " in the District of " Columbia " does not alter the fact that it is still, and only a corporation existing under a law of the United States, by direct special enactment. Its habitat in the " District of Columbia " does not alter or affect the situation. It is not made by this special law a corporation OF the District of Columbia. It is, and by the very terms of the charter must needs be, a corporation OF the United States, existing solely under this act of Congress.

IV.

No special legislation exists, within our knowledge, which exempts corporations thus created from the rule of judicial procedure followed *supra*. It is true that by special legislation (act of July 12, 1882, 22 Stats., 162, Ch. 190, Sec. 4, and act of August 13, 1888, 25 Stats., 433, Ch. 866, Sec. 4), National banks are, for jurisdictional purposes, to be deemed citizens of the States in which they are respectively located. But this special provision with respect to National banks demonstrates that all other cor-

porations created by express federal statute (as in the case at bar) necessarily fall within the rule announced in *Bank* v. *Osborn*, and the subsequent numerous adjudications of this Court following the same rule.

V.

The complaint herein affirmatively pleads the defendant Supreme Lodge as "a corporation duly organized and "existing under and by virtue of an act of Congress of "the United States, approved by the President of the "United States on the 29th day of June, 1894, * * *" (Rec. 3), thus justifying the removal of the cause to the Federal Court.

Oregon Short Line, &c., Ry. v. *Skottowe*, 162 U. S. 490-494.

VI.

Counsel for defendant in error challenged the right of removal when petition was filed therefor in the State Court, and was allowed to contest same before the State judge granted removal of the cause (Rec. 8).

VII.

The plaintiff in error is not treated in Alabama as a foreign corporation of a sister State, and hence required to comply with the technical rules of procedure prescribed by the laws of Alabama before it can do business therein, but is treated as a corporation existing under a law of the United States, and hence not within such requirements.

VIII.

Frequent adjudications appear in the Federal Reports involving controversies between this Order and holders of

benefit certificates in the endowment rank thereof, who are citizens of different States. So far as known the right of the Supreme Lodge to invoke the jurisdiction of the Federal Courts has never been ruled adversely therein. Concurrence of the Federal Courts herein, whilst not controlling, should be persuasive.

Respectfully submitted.

ALDIS B. BROWNE,
ALEX. BRITTON,
Attorneys for Plaintiff in Error.

EDWARD DE GRAFFENREID,
Attorney for Defendant in Error.

No. 170.

Brf. of De Graffenreid for Def.

Office Supreme Court U. S.
FILED
MAR 5 1900
JAMES H. McKENNEY,
Clerk.

Filed Mar. 5, 1900.

SUPREME COURT OF THE UNITED STATES.

No. 170.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS,

vs.

JOSEPHINE R. WITHERS.

BRIEF AND ARGUMENT OF EDWARD DE GRAFFENREID FOR THE DEFENDANT IN ERROR.

SUPREME COURT OF THE UNITED STATES.

No. 170.

SUPREME LODGE OF THE KNIGHTS OF PYTHIAS,

vs.

JOSEPHINE R. WITHERS.

BRIEF AND ARGUMENT OF EDWARD DE GRAFFENREID FOR THE DEFENDANT IN ERROR.

STATEMENT OF CASE.

On the 3rd day of March, 1896, the defendant in error commenced this suit in the Circuit Court of Hale County, Alabama, against the Plaintiff in error, on an Insurance Policy or Benefit Certificate issued by the Plaintiff in error on the 29th day of September 1885 on the Life of Robert W. Withers. The Complaint in the case was in the following words:

JOSEPHINE R. WITHERS, Plaintiff

vs.

SUPREME LODGE KNIGHTS OF PYTHIAS, DEFENDANT.

The Plaintiff claims of the defendant, the Supreme Lodge Knights

of Pythias, a Corporation duly organized and existing by virtue of an Act of Congress of the United States on the 29th day of June 1894, and which is doing business in Hale County, Alabama, the sum of three thousand dollars due by a certain instrument or Policy of Insurance upon the life of R. W. Withers, and which is in words and figures, as follows :—

No. 11072. *Certificate of Membership.* Fourth class. $3,000.

Endowment Rank Knights of Pythias.

This certifies that Brother Robert W Withers received the Endowment Rank of the Order of Knights of Pythias in Section No. 432 on March 2, 1883, and is a member in good standing in said rank. And in consideration of the representations and declarations made in his application bearing date of January 1st, 1883, and his absolute surrender of the Certificate heretofore held by him in First and Second Classes for cancellation, as requested in his application for transfer to the Fourth Class, bearing date of August 13th 1885, all of which is made a part of this contract and the payment of the prescribed admission fee ; and in consideration of the payment heretofore to the said Endowment Rank of all monthly payments as required, and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars will be paid by the Supreme Lodge Knights of Pythias of the World to Josephine R. Withers, wife, as directed by the said Brother in his application, or to such other person or persons as he may subsequently direct by change of beneficiary ; entered upon the records of the Supreme Secretary of the Endowment Rank, upon due notice and proof of death, and good standing in the Rank at time of death, and surrender of this Certificate.

Provided, however, that if at the time of the death of said Brother one monthly payment to the Endowment Fund by members holding an equal amount of Endowment shall not be sufficient to pay the amount of Endowment held by said Brother, the benefit to be paid in case of death shall be a sum equal to one payment to the Endowment Fund by each member holding an equal amount of Endowment—

And it is understood and agreed that any violation of the within mentioned conditions or the requirements of the laws in force governing this right, shall render this certificate and all claims null and void, and that the said Supreme Lodge shall not be liable for the above sum or any part thereof.

(Signed) JOHN VAN VALKENBURG,
Supreme Chancellor.

Attest: R. E COWAN,
[SEAL.] *Supreme Keeper of Records and Seals.*

Issued this the 29th day of September, 1885, P. P. No. 11 at Washington, District of Columbia, and registered in Book 1, folio 222.

HAHN NELSON,
Supreme Secretary.

And the plaintiff avers that the said Valkenburg, R. E. Cowan and H. Nelson who signed the said above described instrument, were authorized by the said defendant to issue the same; that they duly executed and delivered the same to the said R. W. Withers for the benefit of this plaintiff; that the said R. W. Withers from the issuance of said certificate to the time of his death complied with all the reasonable and legal requirements of said corporation; that he regularly paid all assessments due by him to the said corporation on account of the said certificate, and duly paid all the premiums on the said instrument above described; that the said R. W. Withers departed this life in Greensboro, Hale County, Alabama, in good standing with the said corporation, under all the reasonable rules and legal regulations of the same, on November 1st, 1895, leaving this plaintiff, his widow, surviving.

Plaintiff further avers that, at the time of the issuance of said policy the said defendant was a corporation organized and doing business under the laws of the District of Columbia, and that on the 29th day of June 1894, the said corporation was re-incorporated by the said Act of Congress above described; that the said corporation, the Supreme Lodge Knights of Pythias created or re incorporated by the said Act of the 29th day of June 1894, was in fact the same corporation which issued the said certificate; that the said corporation created by the Act of the 29th day of June 1894, became the possessor of all the rights and assumed all the liabilities of the said corpnration which issued the said certificate, and that after the said 29th day of June, 1894, the said R. W. Withers regularly paid to the Endowment Rank of said Supreme Lodge Knights of Pythias all amounts due by him as a holder of said certificate or as a member of the said order.

And this plaintiff avers that the said Supreme Lodge Knights of Pythias was, at the time of the issuance of the said certificate and is now, a company authorized by its By-Laws and by the Articles of its Incorporation to insure the lives of its members for the benefit of those dependent upon them.

The plaintiff avers further that this plaintiff notified the legally constituted officers of the said defendant of the death of the said R. W. Withers, and called upon them for payment and for blanks upon which to make the customary proof of death, but that the said legally appointed and constituted officers of said defendant refused to furnish this plaintiff with any blanks for said purpose, and notified this plaintiff that under no circumstances would the said defendant pay the said sum due upon the said certificate or instrument in writing or any part of the same, and which said sum of money, with interest thereon, is now due

and unpaid, and the plaintiff brings suit.

SEAY & DE GRAFFENRIED,
Attorneys for Plaintiff.

Filed March 3rd, 1896.

Thereupon by proper proceedings and orders of Court, the said cause was removed to the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, by an order of the Circuit Court of Hale County, Alabama, made on the 23rd day of October, 1896.

The case was by consent of all the parties transferred from the Circuit Court of the United States for the Southern Division of the Northern District of Alabama, to the Circuit Court of the United States for the Middle Division of the State of Alabama, and was tried in said Court on the 6th day of July 1897, on the following pleadings, shown in the following agreement of counsel

Agreement of Counsel Under Which Case Was Tried.

In the Circuit Court of the United States for the Middle District of Alabama, May term, 1897.

SUPREME LODGE KNIGHTS OF PYTHIAS
vs
JOSEPHINE R. WITHERS.

Be it remembered that at the May term 1897, of the Circuit Court of the United States for the Middle District of Alabama, the following proceedings were had in said cause:

The parties by their attorneys made and filed in open Court the following agreement, under which the demurer to the Complaint was withdrawn, and under which the case was tried. and Court and parties waived the filing of formal pleas and replications in this case. The Agreement of Counsel was as follows:

"In this case it is agreed that the same shall be tried upon the Complaint and upon pleas setting up the general issue and a forfeiture of the Certificate sued upon, with leave to give in evidence any fact which might be specially pleaded to the cause of action set out in the Complaint, and with like leave on the part of the plaintiff to give in evidence any fact which in rebuttal of any such plea or in confession and avoidance thereof.

"It is further agreed that if the plaintiff is entitled to recover, she is entitled to recover the sum of three thousand dollars, the amount of the certificate, with interest from the 5th day of November, 1895. If the Court shall be of opinion that the law upon the evidence is for the plaintiff, it shall charge the jury to find a verdict for the plaintiff for three thousand dollars and interest from November 5th, 1895; other-

wise it shall charge the jury to find for the defendant.

(Signed) ED de GRAFFENRIED,
C. E. WALLER,
H. C. TOMPKINS,
Attorneys for Plaintiff.

THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

There was jury and verdict for plaintiff in the Court below for the sum of $3,392.54, and defendant appeals.

EVIDENCE

The plaintiff offered in evidence the following:

Agreement as to testimony of S. W. Chadwick.

It is admitted in this case as follows:

That S. W. Chadwick, if present would testify as follows:

"My name is S. W. Chadwick, and I am now and have been for more than 20 years the Secretary of No. 432, Endowment Rank Knights of Pythias of the World. Robt. W. Withers was a member of said Rank, and he has paid over to me regularly as the Secretary of said Rank his dues on account of his policy No. 11,072, and the money was regularly remitted to the Secretary of the Board of Control at Chicago. The last payment that was made to me by Col. Withers was for the dues for the month of October, 1895, which money was paid to me prior to the 10th day of October, 1895. There were large numbers of men who were members of said Section and as I did not collect from all of them their dues until the latter part of October, I did not send the money to the Board of Control at Chicago until the 31st day of October 1895. Having collected by the 31st day of October 1895 all the dues due by all of the members of said Section for the month of October, I mailed in the afternoon of October 31st, 1895, to H. B. Stolte, Secretary of the Board of Control, Chicago, Ills., a check covering all amounts due by all of the members of said Section for the month of October. At that time the mail was made up in Greensboro ~~was made up~~ early in the evening, and when letters were placed in the post-office after the mail was made up the postmaster, such letters went into the mail of the next day. As Secretary of the Section I kept a set of books, and my books show, and I positively recollect that I mailed the letter with a check for money on the afternoon of the 31st of October 1895. I sent the money by a check just as I had always previously done.

It has never been the custom at my office for me to send the money off by the 20th of the month. I usually sent the money off about the last days of the month. For the previous year I had mailed to the

Secretary of the Board of Control the dues of the Section as follows: October 27th, 1894, November 28th, 1894, December 29th, 1894, January 29th, 1895, February 27th, 1895, March 30th, 1895, April 29th, 1895, June 29th, 1895, July 28th, 1895. August 29th, 1895, September 28th, 1895, October 31st, 1895, all of which sums were accepted by the Board of Control.

When the money reached Chicago after the first of the month, Mr. H. B. Stolte mailed to me as Secretary of Section No. 432, a letter, a substantial copy of which is hereto attached, marked Exhibit X for identification. These letters I always destroyed and did not inform the members of the Section of the receipt of them, as I knew the money had reached Chicago by the time I received the letter. I am a Banker and Insurance Agent."

It is admitted that no notice was ever mailed at any time by the Secretary of the Board of Control, or any other member thereof, to Col. R. W. Withers notifying him of his suspension by reason of the failure of the Secretary of Section 432 to remit the dues of the Section to the Board of Control on the first day of the month succeeding the month in which said dues became due.

It is admitted that Robert W. Withers, named in policy No. 11,072, died of an attack of cholera morbus on November 1st, 1895, and that he was taken sick and died on that day, and that proof of death has been waived by the defendant, and on the 5th day of November, 1895, defendant refused to pay the amount of the certificate, or any part of it, denying any and all liability on such certificate.

(Signed) ED. DE GRAFFENRIED,
H. C. TOMPKINS,
Attorneys for Plaintiff.
CHAS. P. & THOMAS G. JONES,
Attorneys for Defendant.

Letter from Board of Control.

EXHIBIT X.

Office of Board of Control, Endowment Rank Knights of Pythias.

Chicago, November 1st, 1895.

S. W. Chadwick, Secretary Section 432, Endowment Rank Knights of Pythias:

DEAR SIR AND BROTHER:—You are hereby notified that the above Section having failed to pay the monthly payment and dues for the month of October, 1895, as required under Article 4, Section 6 of the general laws, the section and all members thereof stand suspended and

such members certificates have thereby become forfeited.

Under provisions of said law, the section may regain all rights as a section and any surviving members thereof, not less than five, may regain full rights and privileges, if within thirty days from the date of suspension payment of all monthly payments, assessments of dues, accrued upon said members is made to the Board of Control.

Less than five members of a section so suspended may upon the payment to the Board of Control within thirty days from suspension of all accrued monthly payments, assessments or dues, and fifty cents each for a clearance card, regain membership and all rights and privileges attached thereto, whereupon clearance cards will be issued them, such members shall be held subject to all requirements governing the issue of clearance cards as provided for in Article 4, Section 8, of the General Laws.

The Board of Control expresses the hope that the membership will avail themselves of the privileges thus afforded by law, and cause immediate payment of all arrearages to be made.

Fraternally yours,

(Signed) H. B. STOLTE,
Sec'y Board of Control.

The plaintiff then introduced in evidence the Policy of Certificate of Membership sued on, a copy of which is set out in the Complaint.

The plaintiff then introduced Section 4 of General Laws, adopted and promulgated by the defendant on January 25th, 1894.

"Section 4, Monthly payments and dues of members holding certificates of endowment shall be due and payable to the Secretary of Section without notice on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the Certificate or Endowment and all right, title and interest such member or his beneficiary may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited Certificate. If approved by the Medical Examiner in Chief and accepted by the Board of Control, a new certificate shall be issued and the rating shall hereafter be at the age of the nearest birthday to the date of the last application."

It is agreed that said above General Law has never been repealed and still exists as a law of the corporation, the defendant in this suit, and has existed as such ever since January 25th, 1894, and the same, subject to legal exception, may be had in evidence in this cause, the cause being Josephine R. Withers, vs. Kights of Pythias of the World.

Indorsed: Filed June 23rd, 1897. J. W. Dimmick, Clerk.
(Signed) ED. DE GRAFFENRIED,
H. C. TOMPKINS,
Attorneys for Plaintiff.
THOS. G. & CHAS. P. JONES,
Attorneys for Defendant.

And also introduced the following General Law of the Endowment Rank:

Art. IV, General Laws Endowment Rank.

"Each applicant for membership in the Endowment Rank shall upon completion of his application for transmission to the Board of Control, pay to the Secretary of the Section, in accordance with his age and the amount of endowment applied for, a monthly payment as provided in the following table, and if accepted, such member shall continue to pay the same amount each month thereafter as long as he remains a member of the Endowment Rank, unless otherwise provided for by the Supreme Lodge or Board of Control of the Endowment Rank Knights of Pythias of the World,"

It is agreed that the table shall not be set out, but that the amount to be paid by Withers, according to the table, was $4.90 per month.

(Signed) H. C. TOMPKINS,
ED. DE GRAFFENRIED,
Attorneys for Plaintiff.
THOMAS G. & CHAS. P. JONES,
Attorneys for Defendant.

The above was all the evidence offered by the plaintiff.

The defendant then introduced in evidence the following agreement of counsel:

Agreement of Counsel.

"It is admitted in this case that R. W. Withers originally had certificate in the First and Second Class, and that said certificates were issued on an application dated January 1, 1883, the original of which is hereto attached and which is the application referred to in certificate No. 11,072, being the certificate sued on in this case, and set out in the original complaint.

"That R. W. Withers died Nov 1st, 1895. It is further admitted that the dues for the month of October, which were payable by said Withers by virtue of the Certificate above described, were included in a check, and sent by S. W. Chadwick with his remittance dated Octo-

ber 31st, 1895, which said remittance was received by the Board of Control on the 4th day of November, 1895. That H. B. Stolte, Secretary of the Board of Control, on the first day of November 1895, no remittance for the October dues of Section 432 [of which said R. W. Withers was a member) having reached the Board of Control, sent S. W. Chadwick a letter, which is attached to a statement of his testimony. That on receipt of said remittance on the 4th of November 1895, that H. B. Stolte sent to S. W. Chadwick a receipt on a Postal Card, a copy of which is hereto attached. That as soon as the Board of Control learned of the death of R. W. Withers, it returned to S. W. Chadwick, Secretary, by Registered letter, under date of November 5th, 1895, the amount of the October dues of the said Withers, but said S. W. Chadwick returned it to the Board of Control, where it is now held to his order. That the following General Law was adopted by the defendant in January 1894, and has never been repealed and is still in force.

"Sec 6. The Secretary of the Section shall forward to the Board of Control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the Board of Control on or before the last day of the same month the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the Secretary of the Board of Control to the President and Secretary of such Section.

"Provided, that the Section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all right as a Section, and any suviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments and dues accrued upon said members.

"Sec. 10. Sections of Endowment Ranks shall be responsible and liable to the Board of Control for all moneys collected by the Secretary or other officers from the members for monthly payments, assessments or dues not paid over to the Board within the time and manner prescribed by law. Officers of Sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the Board of Control of the Endowment Rank of the Supreme Lodge."

(Signed) H. C. TOMPKINS,
ED. DE GRAFFENRIED,
Attorneys for Plaintiff.

THOMAS G. & CHAS. P. JONES,
Attorneys for Defendant.

The defendant then introduced in evidence the application for membership of Robert W. Withers in the Endowment Rank Knights of Pythias, set out in the Transcript, the only part of which having any materiality to the issues, is in the language following:

"I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled by all the laws, rules or regulations of the order governing this Rank now in force, or that may hereafter be enacted, or submit to the penalties therein contained. To all of which I willingly and freely subscribe.

Dated at Greensboro, Ala., this the first day of January, 1883.

(Signed) ROBERT WALKER WITHERS,

Member of Eureka Lodge No. 29, Knights of Pythias, City of Greensboro. State of Alabama."

The defendant also introduced the Medical Examiner's certificate, certificate of Lodge and report of Committee on Character, set out in the Transcript, but immaterial to any question involved in this case.

The defendant then introduced the following remittance envelope: Postmark: Greensboro, Alabama, November 1st, 1895. Endowment Rank, Knights of Pythias. If not called for in ten days return to S. W. Chadwick, Banker, Greensboro, Ala. This envelope bore the following directions: Board of Control, Endowment Rank, Knights of Pythias, rooms 43 to 49, Commerce building, 14 & 16 Pacific Ave, Chicago, Ill.

The defendant then introduced the remittance sheet, found set out in Transcript, which is immaterial to any issue here presented.

The above was all the evidence material to the issue in this cause, and the Court thereupon gave to the Jury the charge in writing, at the request of the Plaintiff, to find a verdict for the Plaintiff for the sum of Three Thousand Dollars, with interest from the 5th day of November 1895. To the giving of which charge the defendant then and there duly excepted.

The defendant also asked the Court to charge the Jury that if they believed the evidence, they must find for the defendant, but the Court refused to give said charge, and the defendant then and there excepted.

ARGUMENT.

The Record discloses that the appellant, The Supreme Lodge of the Knights of Pythias, is a corporation organized for a dual purpose. In the first place it is a social organization. In the second place it furnishes Life Insurance to such of its members as desire it. It is, so far as this case is concerned, a Benefit Society or Mutual Benevolent Life

Insurance Organization. For the superintendence of the Organization, it has a Supreme Lodge, its members being banded together in Subordinate Lodges. For the superintendence of its Insurance Deparment it has its Board of Control. Those holding its insurance are members of its Endowment Rank, the insured members of a local or Subordinate Lodge forming a Section. Not all the members of a Local Lodge are members of the Section, but all members of a Section are members of the General Order of Knights of Pythias. Its Life Insurance Department was formed, not for the profit of the Organization, but to provide an indemnity for the wives and children of its members against the loss by death of the head of the household. Such organizations have been termed the "poor man's life insurance companies." They furnish to those of moderate incomes a cheap and simple substitute for life insurance.

Bacon on Benefit Societies and Life Insurance, page 3. Section 3.

For the above reason it has always been the law that, "in the case of benefit societies, the contract must be construed liberally in order to carry out the benevolent object of the creation of these organizations."

Bacon on Benefit Societies and Life Insurance, page 226, Section 178.

This liberality of construction is, however, for the benefit of the certificate holder that the purpose for which he becomes a member may not be defeated; not for the benefit of the Society, that the certificate holder may be easily deprived of his rights.

Where a Forfeiture is involved, strictness of construction is the rule. Courts will seize upon technicalities to prevent forfeitures.

In the case at bar, Col. Robert W. Withers took out a policy of Life Insurance for Three Thousand Dollars, for the benefit of the plaintiff in the Court below, his wife, on the 2nd day of March, 1893, and from that day till the day of his death, which occurred on the first day of November, 1895, he complied with all of the rules and regulations of the order and regularly paid over to the officer authorized to receive it, his monthly dues or premiums. By the rules of his order, he was required to pay over to the Secretary of his Section his dues by the 10th of the month. His last dues were paid over before the 10th day of October, 1895, to S. W. Chadwick, the Secretary of his Section, as required by the regulations of his Order.

Chadwick was required to transmit the money to the Board of Control at Chicago by the 20th of the month, with the proviso that if "such payments and dues are not received by the Board of Control on or before the last day of the same month, the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank and their certificates and all rights, title and

interest therein shall be forfeited."

Chadwick forwarded the money to the Board of Control on the last day of of October Col. Withers died on the following day, November 1st, and it is contended that the appellant is not liable because of Chadwick's delay.

The above contention is based on the assumption that Chadwick was the agent ot Withers for the purpose of forwarding money, not the agent of the Company.

Section 4 of the General Laws of the Order required Withers under a penalty of a forfeiture of his policy, to pay the money to Chadwick by the 10th day of the month. He was not permitted to pay the money to the Board of Control. Chadwick was the only person to whom he was permitted to make payment.

This contention that the Plaintiff in error is not liable in this action grows out of the following part of Section 10 of a General Law adopted by the defendant in January 1894, viz:

"Officers of Sections are the agents of the members and shall in no wise be considered as the agents or representatives of the Board of Control of the Endowment Bank or of the Supreme Lodge."

To use the language of Chief Justice Marshall, in the case of Yeaton vs. Fry, 5 Cranch, 341: "The words are the words of the insurer, not of the insured." The question as to whether such a by-law of a beneficient society is operative in a case like the present was directly before the Court in the case of Whitesides vs. Supreme Conclave Improved Order Hephtasophs (Circuit Court E. D. Tennessee, S. D. Feb. 4, 1897,) 82 Fed. Rep. pages 275, 276 and 277. In that case the defendant was a Benefit Society. In that case payment was made to an officer of the local lodge, after the time for payment had elapsed, and the money was returned by such officer, who had consented to give time. In that case under the Constitution and by-laws of the defendant, "the officers of a subordinate Conclave shall at all time be deemed and held to be agents and servants of the members of the Conclave of which they were elected officers, and not in any sense the agents or servants of the Supreme Conclave for any purpose whatever, and that all acts of any such officers relating to a benefit certificate shall be held and deemed to be the act of the person nolding such certificate, and shall not be binding upon the Supreme Conclave."

In his charge to the jury on this subject, the Judge. (Clarke, District Judge) said: "Notwithstanding the provision of the Constitution and by-laws O'Donohue was the agent of the Supreme Conclave in the matter of collecting the assessments, and that his acts in extending the time of payment were binding on the defendant. The Court said in substance that it was not competent by declaration made in advance to deny the real fact and its effect, and require the Court

to hold what is known to be contrary to the truth. This would neither be good law nor good morals. When officers of the local order act distinctly for the general order, as in collecting and remitting assessments, the Court and Jury must not be expected to find directly against the plain truth. Exemption from liability must be claimed otherwise than upon a false statement of fact."

A motion for a new trial was made in the above case, but the Court in a carefully considered opinion, adhered to the above view.

In the case of Knights of Pythias of the World—the identical party to this record—vs. Bridges, from the Civil Court of Appeals of Texas, January 20th, 1897, 39th South Western Reporter, pages 333, 334 and 335 the same conclusion was reached In that case the Court says:

"All the powers of the local sections of the order were derived from the Supreme Lodge and Board of Control as were all the powers of every officer of the inferior lodges. The subordinate lodge was organized under a warrant of authority issued by the Board of Control, supreme officers of the order, with warrant authorized the local lodge to admit persons to membership "according to the laws of the order as promulgated from time to time by the Supreme Lodge and the Board of Control of the Endowment Rank." Bridges was admitted as a member of the local lodge under the forms, and according to the laws of the order, as promulgated by the Supreme Lodge and Board of Control. The powers of the local lodge and its officers were derived from and conferred by the Supreme Lodge and the Board, and it was organized by express warrant of the Board.

"We do not hesitate to say that the inferior lodges and their officers acting in the scope of their authority, were the agents of the order, and that their knowledge of the facts affecting their duties would be notice to the Supreme Lodge of such facts, as in the case of agents of ordinary insurance Companies. The Court did not err in so instructing the Jury."

And generally it may be said. "that the fraud or mistake of a knavish or blundering agent, done within tne scope of his powers, will not enable the Company to avoid a policy to the injury of assured, who innocently became a party to it, though a stipulation in the policy provides that such agent shall be deemed the AGENT OF THE INSURED."

Bacon on Benefit Societies &c, Section 426, and authorities cited.

In fact, this effort by a by-law, to shift resonsibility and to make the real agent of the insurer the agent of the insured, is an ancient device an old trick, much resorted to by insurance companies, but which the Courts have long since exposed. As has been well remarked by the Supreme Court of the United States in discussing this subject: "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a Court in place of an actuality of fact."

Bacon on Benefit Societies, Sec. 153.

Ins. Co. vs. Wilkerson, 13 Wallace, 235.

There is no distinction in this regard between a stock company and a mutual company.

Bacon on Benefit Societies, etc., Sec. 156, and cases cited.

That Chadwick was the agent of the Order and not of Withers, and that the above is the proper construction of the bylaw, is shown by the language of the by-law itself. The language of the by-law is: "Monthly payments and dues of members holding Certificates of Endowment shall be DUE AND PAYABLE to the Secretary of the Section without notice, on the first day of each and every month; and a failure to make such PAYMENT on or before the 10th day of the month shall cause, from and after such date, a forfeiture of the Certificate of Endowment, etc."

The by-law says that Withers should make payment to Chadwick. If Chadwick was Wither's agent, Withers could not make PAYMENT to Chadwick The delivery of money by the principal to his agent, for another, is not a PAYMENT.

"Payment is the transfer of money from one person, the payor, to another, the payee"

Rapelje & Lawrence Law Dictionary.

The case relied upon by appellant to sustain its view on this subject is the case of Campbell vs. Supreme Lodge, Knights of Pythias of the World, decided by the Supreme Court of Massachusetts, on the 21st day of May, 1897. This case of Campbell's is somewhat similar to the case at Bar. It differs from it, however, in a number of material points. In the first place, the by-law under discussion, was adopted in 1894. In Campbell's case the record does not disclose when the policy was issued. It may have been issued after the adoption of said by-law. In the case at Bar the policy was issued long before the adoption of the by-law, was an Alabama contract and under the laws of Alabama, while a party may contract to be bound by future by-laws, the Courts engraft upon that contract the stiplations that such future by-laws shall be reasonable or they are void. (See Supreme Commandary, etc., vs. Ainsworth, 71 Ala, 436.) In Campbell's case we are not informed as to what stipulations were contained in the policy or in the application for the same, and for aught we know the by-law was incorporated in the policy and formed a part of the same. In the case at Bar the policy is before us, and it contains the express stipulation that the Company would pay: "In consideration of payment hereafter to said Endowment Rank of all monthly payments as required and the full compliance of all the laws governing this Rank, now in force, or

that may hereafter be enacted, and shall be in good standing under said laws, the sum of three thousand dollars, etc." Here was the CONTRACT between Withers and the Plaintiff in Error, and on the part of Withers it was carried out in its every detail. There was no failure to perform its stipulations on his part. It is admitted that Withers paid the premiums as required, and so far as his acts were concerned had complied with all the laws and requirements of the Order. Did he contract to do anything more? If he did, the policy which is the evidence of the contract does not disclose it. The agreement, as shown by the policy, was, that if he paid the monthly payments as required, and complied with the laws of the Order, the Company would pay, etc. It is admitted as stated above, and shown by the record, that Withers did pay his monthly payments as required by the laws of his Order, and that he did comply with all of its requirements. No part of his contract was left unperformed at the time when the Plaintiff in Error was called on to discharge its agreement. The contract set out above and set out in the Complaint, is the basis of the recovery sought in this suit; it obligated Withers (under the laws introduced in evidence and set out in the transcript) to pay to the Secretary of his Section, on the completion of his application the amount called for, and determined by his age and the amount of endowment applied for (Art. 4, General Laws, Endowment Rank); and to pay each month the policy continued in force, the same amount. Section 4, of the General Laws, promulgated January 25th, 1894; required that this monthly payment should be made before the 10th day of the month to the Secretary of the Section. These were the laws with which personal compliance was possible, and therefore these were the laws he contracted to comply with. He was not the Secretary of his Section, and could not forward himself, to the Board of Control the assessment. That power had been taken from him by the act of the Plaintiff in Error, and in making the monthly payment before the 10th day of each month, he discharged every obligation he had assumed in the contract, as shown by the Policy, and became entitled to a performance by the Plaintiff in Error of the obligation assumed by it.

In Cambell's case, it seems to have been admitted by the attorneys that a forfeiture had occurred. This admission may have been made by reason of some clause in that policy, which is not contained in Wither's policy, for it is upon this supposition alone that we are able to explain why such an admission should have been made. In fact, the question now under consideration was not discussed by the Court in the Campbell case.

See Supreme K. of P. vs. Campbell, 47 N. E. Rep, page 109.

But further:

If the by-law is applicable, and if Chadwick was Wither's agent, we submit that the Plaintiff in the Court below was entitled to recover be-

cause the money was placed in the mails by Chadwick for transmis mission to the Board of Control before the death of Withers.

The by-law provides that a Section failing to pay the monthly payment on or before the last day of the month shall stand suspended, etc.

"Provided that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all rights as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from the suspension of such warrant said Section shall pay to the Board of Control the amount of all monthly payments." etc.

The laws of Benefit Societies generally provide that a member suspended for non-payment of assessment may be restored upon doing certain acts.

On principal these laws are to receive a liberal construction."

Mason vs. Grand Lodge A O. U. W., 30 Minn. 509, 16 N. W., 395.

In Dennis vs. Mass. Ben., 47 Hun. 338, the facts were these: "The defendant issued to one Dennis a certificate of membership, to which were annexed rules and conditions; one of which required that the member should, within thirty days after the mailing of a notice of assessment, pay the same, and provided that if the assessment should not be received by the Company within the time, the contract should lapse and be void, but that "for valid reason to the officers of the Associations (such as a failure to receive notice of assessment) he may be reinstated upon paying assessment arrearages." On February 12th, 1896, a notice of an assessment was mailed to Dennis and received by him, but was not paid within the thirty days, he being stricken with apoplexy on March 8th, and remaining unconscious till March 10th when he died. The beneficiary, on March 31st, tendered the arrearages to the Company, which declined to receive them and refused to be bound by the Policy."

The court said:

"The action was brought by the assignee of the beneficiary, and on the trial the Court directed a verdict for the defendant. On appeal it was held that this was error, that the question as to whether the fact that the party assessed who had paid many previous assessments, was rendered powerless by sudden paralysis before the expiration of the thirty days was not a "valid reason" within the meaning of the contract, should have been submitted to the Jury. In this case the majority of the Court say: What right would the member have had if he had recovered his reason on the day he died? In the first place the words were intended to be operative. The defendant obtained the premiums or agreement to pay assessment upon them. They assured the members that if a valid reason was furnished for default it should

not be conclusive. The use of the restriction as to the validity of the excuse to the officers of the Company did not mean to make them sole arbiters of the validity of the reason. The Company illustrated by citing an instance of a good excuse by the term "such as failure to receive notice of assessment." If an assessment notice had not been received without the fault of the member, can it be doubted but that the officers were bound to acknowledge it and reinstate the member upon payment of arrearages? The Company say that is a good excuse, and impliedly say that other good reasons for default must be acknowledged also. The Court of Appeals have decided that a discretion given to a Trustee is not personal. Is the reason assigned a valid reason under the contract? There can be no donbt of this fact. The assessed had thirty days, and before he paid the assessment he was rendered powerless by sudden calamity, his intent to pay is manifest by numerous previous payments. This was the construction put on the rule by the defendant.

They, again, after he was unconscious, notified the member of his forfeiture for non-payment, and that the contract might be renewed if in good health. This condition in respect to good health is not in the rule, and the officers had no right to add it to the rule. If a valid reason existed for the default the member must be reinstated, because of the valid reason for the default, and not because he had a valid reason and was in good health The rule as created by the Company in this respect would exclude cases where it was valid that they should be included in the contract. If the good reason was rejected in cases of ill health or death, the insured would lose a real value in the contract. If members become sick or die, the policy is at an end no matter how completely the default may be excused. This would make a very unfair contract, not within the words of the rule, and one which the Company would be unwilling to print in its rules."

In the case at Bar, Withers was a "surviving member of the Section," when the money was forwarded to the Board of Control. There was no necessity for the beneficiary here to tender money as in the case above cited. Withers himself, before his death, had done all that could be done, but because he dies while the money is in course of transmission, the benefit of his certificate is denied his beneficiary. The members who were living when the money reached Chicago (but who had done no more than Withers) incurred no forfeiture. Why should the fact of Withers death operate to deprive him of the benefit of a full and complete compliance with the rules and laws of the Company. As was said by the Court below, Bruce, Dist. Judge: "Again, can this scheme of insurance shown in the rules and law of the defendant be sustained upon sound legal principles? When the money for the monthly dues was received by the Board of Control in Chicago a receipt, signed by H. B Stolte, Secretary of the Board of Control of the following purport was received by Secretary Chadwick, of the local

section: "Received in payment of the monthly dues for October 1895, on condition that all members from whom above payment is made were living at the date of this receipt," which is November 4th, 1895. It was said in the argument, in reply to the proposition insisted upon, that the defendant Company had and retained the money and was, therefore, not in the position to resist the payment of the loss, that this was but a conditional receipt, or receipt upon condition, for the money, and that may have been an answer to the proposition presented in behalf of the Plaintiff herein, but apart from that, here is a scheme of insurance which provides in case of forfeiture a way of recovery for surviving members, but if the member dies, as in this case, between the time that the dues are mailed for transmission to the board of control at a distant point, in this case, Chicago, Illinois, and its receipt by the Board of Control there is no means by which his representative in interest or beneficiary in his policy can be restored from the penalty of the forfeiture. Policies of insurance are taken out and the whole scheme of insurance contemplates that it is not for the benefit of the insured, but for the benefit of those dependent upon him, and if you eliminate this element from it, Life Insurance as a system would be deprived of the main reason by which it has won its way to favor. And yet here the survivor can be relieved of forfeiture, and is relieved, "if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments or dues accrued upon members," but he who dies, as stated, however prompt he may have been in payment of dues, and though no personal default can be attributed to him, still his policy is forfeited, and his beneficiary is without relief or any means by which he can save himself."

In the case of Jackson vs. North Western Mutual Relief Association, 47th North Western Reporter, pages 733 to 737, the facts were as follows: The by-laws provided that within six months after a forfeiture, the defaulting member might be re-instated by paying all arrearages, and furnishing a satisfactory certificate of health. After the assessment for which a forfeiture was claimed, several notices of subsequent assessments were sent the assured, each accompanied by a re-instatement contract for her to sign. Assured received the last of these notices on January 27th and on February 12th she signed the application for reinstatement, enclosed it, together with money for all arrearages, and a certificate showing her health to be as good as when she first entered the association, and carried the package to the post-office. While doing so she caught a cold and died the next day. The Company received the package the day after her death, and after knowledge thereof returned it to her address.

The opinion of the Court on the facts was as follows:

"It seems that the last package containing the money for all past

dues was received by the Company the 14th day of February next after it was mailed. It was laid aside on account of the sickness of the Secretary. In the meantime having heard of the death of Mrs. Jackson, he returned the money to her address on the 23rd or 24th of the same month. The Court instructed the jury on that subject as follows: 'That Mrs. Jackson was dead before the reinstatement and money reached Madison, if you find such to be the fact, was good cause for disapproval of her application.' This instruction was erroneous. If Mrs. Jackson mailed the papers and money, together with a certificate of health, in proper time, according to the by-laws or custom of the company, her rights became fixed by it, and her subsequent death before the package reached the company could not change them. She had done all that the company required of her by the notice of reinstatement. She was then reinstated, if she would have been had she not died until after the package had reached the company. Her death made no difference with her reinstatement."

Jackson vs. North Western Mut. Relief Assn., 47 N. W. Rep. 736-7.

See also:

Connelly vs. Association, (Conn.) 20 Atlantic Reporter, 671.

Stylow vs. Insurance Co., 34 N. W. Rep., 151.

Van Houten vs. Pine, 38 N. J. Equity, 72.

Oates vs. Supreme Court of Foresters, 4 Ontario Reports, 535.

Bacon on Benefit Societies and Life Insurance, Sec. 385, pages 576 to 582.

It will be observed that in the present case, under the rules of the order no forfeiture of the policy had occurred when Chadwick placed the money in the post office. We submit that under the course of dealing and by express direction the placing of the money by Chadwick in the post office was a payment and operated to prevent a forfeiture.

Buell vs. Chapin, 99 Mass. 594.

Gurney vs. Howell, 9 Gray, 404.

Crane vs. Pratt, 12 Gray, 348.

Morgan vs. Richardson. 13 Allen, 410.

Campbell vs. Supreme Lodge, 47 N. E. Rep., 109

If the Court should be of opinion that the by-law in question is applicable to the case at Bar, the defendant in the Court below is estop-

ped from insisting upon the forfeiture because of its previous custom and course of dealing with S. W. Chadwick. Chadwick's testimony shows that he had been Secretary of the Section of which Withers was a member for more than twenty years. He further testifies as follows: "It had never been the custom at my office for me to send the money off by the 20th of the month. I usually sent the money off about the last days of the month. "His testimony further shows that for the year previous to Withers death the remittances were made as a rule between the 28th and 30th of the month, and that all of the sums remitted were accepted by the Board of Control." It is true that he testifies that when the money reached Chicogo after the first of the month, the Secretary of the Board of Control mailed to him a letter informing him of the suspension of the Section, but he testifies that such letter was always destroyed by him and that he did not inform the members of the Section of the receipt of the same as he knew that the money had reached Chicago by the time he received the letter; No notice was ever given to Withers of the accustomed delinquency of Chadwick, and the defendant utterly failed to show that the Board of Control ever mailed to the President of the Section, as required by the very by-law invoked in this case, of such delinquency of Chadwick. If the Board of Control, as required by such by-law, mailed such notice to the President, it had possession of such proof and and it was the duty of the defendant to have made such proof, and as it utterly failed to make the proof, the presumption is that such letter was not mailed as required. We presume that notice was required to be given to the President of the Section of such delinquency in order that the Section might be informed of the failure of the Secretary to perform his duties, and as no notice was received by the President, the Section had a right to presume that the Board of Control was satisfied with the action of the Secretary, and the members had a right to rely on their payments made to Chadwick under the requirements of the law.

"Any agreement, declaration or course of action on the part of an insurance company which leaves a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, will estop the company from insisting on a forfeiture although it might be claimed under the express letter of the contract."

New York Life Insurance Co. vs. Egleston, 96 U. S. Reports (6 Otto), 572, L. C. P., Book 24. bottom page 342.

Phœnix Mutual Life Insurance Co., vs. Doster et als., (see S. C. 16 Otto, 30 to 38) L. C. P., Book 27, bottom page 65.

Bacon on Benefit Socities, etc., Lec. 361 to 362.

Manning vs. Ancient Order United Workmen (Court of Appeals of Kentucky, Oct. 8, 1887) 5 S. W. 385.

Supreme Lodge Knights of Pythias vs. Kalinsky, 57 Federal Reporter, 348.

Jackson vs. North Western Mutual Relief Assn., (Wis.) 47 N. W. Rep., 733.

Kenyon vs. Knights Templar, etc., (N. Y.) 25 N. E. Rep., 299.

Stylow vs. Insurance Co., (Wis) 34 N. W. Rep., 151.

Sweetzer vs. Odd Fellows Mut. Aid Assn., 117 Ind., 97.

The by-law insisted upon is not applicable to the case at Bar. The by-law was passed in 1894, long after the policy of insurance in this case had been taken out by Withers. Withers in his application for the policy agreed as follows: "This contract shall be controlled by all the laws, rules, and regulations of the order governing this Rank now in force, or that may hereafter be enacted." Reference is made to the case of Supreme Commandery, etc., vs. Ainsworth, 71 Alabama, 449. It will be observed that, in that case as well as in all cases expressing a similar view, the Courts hold that by laws enacted subsequent to the issuance of a policy, must be reasonable or they are void.

Allnut vs. Highcourt, etc., 28 N. W., 802.

People vs. Theatrical M etc., 8 N. Y. S., 675.

Erd vs. Bavarian Nat. Aid and Rel. Assn. of Detroit (Supreme Court of Michigan, Oct. 13th, 1887) N W. Reporter, 34, page 555.

Brady vs. Coachman, etc., 14 N. Y. State, 272.

Reasonableness of by-law a matter of law.

Am. & Eng. Ency. of Law (1st Ed.) Vol. 2, note 4, page 173.

The by-law insisted on is unreasonable and void Parties other than Withers and the Order are interested in the Policy. The beneficiary, the plaintiff in the Court below, has an interest therein, and to give this by-law the construction sought by the Order is to disregard the beneficiary altogether. In the first place it is unreasonable to require a man to pay money to a person designated by the payee, and to make the payor responsible for the neglect or fraud of the agent, without furnishing him with information of the neglect or fraud until after forfeiture is declared. It is certainly iniquitous to hold that a by-law is reasonable which gives to living members a method of reinstatement for the neglect of a third person, but which provides no remedy for one who performs his every duty, because he dies before he is, under the rules of the Order, permitted to take any step to protect himself against the neglect of such third person. This is the view taken by the Court below in its opinion, which is printed in the record

in this case.

True the appellant says this was a Beneficial Society, and the Section or Lodge of which Withers was a member, selected its Secretary, and thereby introduced him to the Board of Control as a person of credence, and for that reason the Section was bound by the Secretary's acts. In the first place, the proof shows that a Section of an Endowment Rank is composed of many members, and such rule would place one member of the Section at the mercy of an officer selected by a majority of the members of a Section. Such a doctrine might be invoked where only social rights are concerned. It cannot be invoked to destroy the property rights of a beneficiary, not a member of the Rank, or of a member of the Rank.

To use language heretofore quoted in this brief, the language of this by-law is "the words of the insurer, not of the insured." The designation of the Secretary of the Section as the agent for collecting and transmitting the money was an act of the Order, not an act of Withers or of the Section to which he belonged.

Benefit Societies are in law, Mutual Life Insurance Companies.

Erdman vs. Mutual Insurance Co. etc., 44 Wis. 376.

Bolton vs. Bolton, 73 Maine, 299.

Bacon on Benefit Societies, etc., Section 146.

There is no distinction between policies issued by a stock company and those issued by a mutual company.

Bacon on Benefit Societies, etc., Sec. 156.

If, however, the Court should be of opinion that the by-law in question is applicable to this case, and that Chadwick was the agent of Withers, and not of the Board of Control, the appellant is estopped from making the defense interposed because it retained the premium forwarded to it by Chadwick on the 31st day of October, 1895. If Chadwick was Withers' agent, his agency ceased on November 1st, 1895, when Withers died. The Company has not returned nor offered to return that money to any representative of the beneficiary in the policy or to any representative of the estate of Withers.

It is true that the Board of Control claims to have returned the money to Chadwick, but they admit that Chadwick returned the money to them and that they still hold it. "The doctrine of waiver applies to mutual benefit societies, and if assessments are received after the death of a member by the local lodge the retention of them by the Supreme Lodge waived the forfeiture."

Wickser vs. Knights of Honor, 12 S. W. Rep., 175.

Erdman vs. Mutual Ins. Co., 44 Wis. 276.

Supreme Lodge K. of P. vs. Taylor, 24 Southern Reporter, 247.

Ill. Masons' Benevolent Society vs. Baldwin, 86 Ill., 479.

Bacon on Benefit Societies, etc., Sec. 431.

The above argument is emphasized by the doctrine that forfeitures are not favored in law. If corporations are astute in contriving such provisions, Courts will take care that they shall not be used as instruments of fraud or injustice.

In the case of New York Life Insurance Company vs. Eggleston, (see S. C., 6 Otto, 572 to 580, L. C. P. Book 24, page 842), the Supreme Court say:

"We have recently in the case of Insurance Company vs. Norton, shown that forfeitures are not favored in the law; and that Courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture."

See further:

The Knickerbocker Life Insurance Co. vs. Norton, (see S. C. 6 Otto, 234 to 245) L. C. P. Book 24, bottom page 689,

Phœnix Life Insurance Co. vs. Doster (see S. C. 16 Otto, 30 to 38) L. C. P. Book 27, bottom page 66.

The gentlemen who appear for the Plaintiff in Error argue that the by-law as to the forfeiture is SELF EXECUTING. We join in no argument on that contention but we adopt their argument and cite the authorities cited by them that the compensatory provision as to reinstatement is also SELF EXECUTING. If the failure of the remittance to reach the Board of Control on or before the last day of the month, put the law concerning the forfeiture immediately into operation, then the placing of the money in the mail addressed to the Board of Control, before the expiration of the thirty days created on the instant a reinstatement of the Section. If the membership of the Section became forfeited at midnight of October 31st, 1895, then the next moment the Section became reinstated, under the argument of the gentlemen, and under the language of the by-law, which is as follows: "Provided, that the section whose membership has forfeited their endowment; and whose warrant has been suspended, shall regain all right as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days of suspension of warrant said section shall pay to the Board of Control the amount of all monthly payments assessments and dues accrued upon said members."

Withers was alive when the money was placed in the postoffice, and and he and the Section became immediately reinstated if there was ever

a forfeiture, because that was the provision ol the rule above quoted, and the placing of the money in the postoffice was, by course of dealing and express direction, a payment.

Buell vs. Chapin, 99 Mass. 594.

Curney vs. Howell, 9 Gray. 404.

Crane vs Pratt, 12 Gray, 348.

Morgan vs. Richardson, 13 Allen, 410.

Campbell vs Supreme Lodge, 47 N E. Rep. 109.

In arguing that Chadwick was the agent of the deceased and not of the Corporation, counsel doubtless overlooked the provisions of Section 10, as follows: "Sections of endowment rank shall be responsible and liable to the board of control for all moneys collected by the Secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law."

They assert on the one hand that the officers are not their agents, on the other they hold the section liable TO THE CORPORATION for the money collected by these same officers. How could the Section be considered liable unless the money so paid to the officers belonged to the Board of Control? How could the Board of Control set up claims to the money of a member in the hands of HIS agent? It cannot claim with one hand and repudiate with the other. The very fact of fixing the liability to the BOARD OF CONTROL of the Section for the money in the hands of the Secretary fixes him as the agent of the Corporation in a manner that no subsequent disclaimer can overcome. As we have shown from the authorities cited above this assertion that the officers of the Section are agents of the members and not of the Company is a mere sham. a trick, a wornout device to escape liability on a false statement of fact.

On page 19 of brief for Plaintiff in Error counsel say: "In the case at Bar a notice of suspension was invariably given when there was a delayed remittance from the Section." This is an assertion that is not borne out by the Record. It is shown in there that Chadwick, the Secretary who was delinquent under the claim of the Plaintiff in Error received a notice, and that notice stopped with him. The laws required that not only the Secretary but the President also should receive notice of the failure of the Section to remit, on the idea, we suppose, that it was not to be supposed that a defaulting or delinquent Secretary would be diligent to discover the fact of his default or delinquency to the injured membership. Was any notice ever sent, in accordance with the by-law, at any time, to the President? If such notice was sent the possession of the proof was peculiarly in the

possession of the Plaintiff in Error. It utterly failed to make such proof. The only notice ever sent according to the proof was the notice sent to Chadwick, and that, according to his testimony was destroyed and never presented to the Section or any member thereof. No notice was ever brought home to Withers or the Section of Chadwick's accustomed delinquency.

On page of brief for Plaintiff in error counsel say:

"Expressions may be found in a few decisions to the effect that subordinate lodges, and their officers are agents of the supreme lodge, but these views were expressed in cases where there was no provision to the contrary as in this case."

In Whitesides vs. Supreme Conclave Improved Order Hephtasophs, 82 Fed. Rep. 275, the question of agency was determined against the contention of Plaintiff in Error, where there was a provision in the by-laws to the same effect as in the present case.

See also

Bacon on Benefit Societies etc, Section 426 and authorities cited.

On page 33 of their brief counsel say:

"It was stated in brief for defendant in error in the Court below that:

"It had been the habit of the Secretary of the Section for several years to mail his remittance to the board too late to reach Chicago until after the first of the month."

This statement is not justified by the record.

Replying to this the record shows that for the year preceding the last remittance for Withers, that the remittance mailed October 31st, leaving Greensboro Nov 1st, reached Chicago on November 4th, occupying in transit fully three days. Therefore the remittance made October 27th, 1894 reached Chicago before the first of the month, the remittance of November 28th, 1894 reached Chicago after the first. The same is true by the application of the same calculation to the remittances of December 29th, 1894, January 29th. February 27th. March 30th, April 29th, June 29th, August 28th, September 28th, and October 31st, all in 1895. Thus it is seen that by adopting the calculation most favorable to the Plaintiff in Error and assuming that the remittances commenced the journey the day they were mailed, of which there is no proof, but rather proof to the contrary, all of the said remittances except the first were bound to have been received after the first of the month, and if all took the course of the October 1895 remittance and started the day after they were mailed, all were received after the first of the succeeding month. Counsel assert that the distance from Chicago to Greensboro is about nine hundred miles. There is nothing in the evidence on which to base the assertion.

The Court will observe from Chadwick's testimony, that not only did his remittances fail to reach Chicago before the first of the month, but that from May to October he was a month behind. (Transcript page 12). Thus on October 27th, 1894, he remitted for October, on November 28th, 1894. he remitted for November, on December 29th, 1894, he remitted for December, on January 29th, 1895 he remitted for January, on February 27th, 1895 he remitted for February, on March 30th, 1895 he remitted for March, on April 29th, 1895 he remitted for April, THERE WAS NO REMITTANCE IN MAY. On June 29th, 1895 he remitted for June, on July 8th, 1895 he remitted for June, on Augst 29th, 1895 he remitted for July, on September 28th; 1895 he remitted for August, on October 28th, 1895 he remitted for September and on October 31st, 1895 he sent the October dues. He commenced to fall a month behind in May not catching up until October 31st, 1895.

Neither is there anything in the record to show that the October remittance was "probably received at Chicago on November 3rd, which was Sunday."

The evidence is that it was received in Chicago on November 4th. (See Transcript page 15).

As stated in the beginning of this brief the appellant corporation was not organized for the profit of its members, but to enable them to make provision for those dependent on them beyond the point where human effort must end. For this purpose it was created. For this purpose Robert W. Withers became on January 1st, 1883 identified with its membership, and continued till October 1895 to pay into its treasury each month the amount of his contractual liability. During that period he has perhaps received some of the insignia or regalia of the Order. This, if the contention of the Plaintiff in Error is sustained, is all his widow will receive. An inadequate memorial of his years faithful membership, and all that his honest efforts to provide for his widow will leave her as the result of his connection with the Order, that and the memory of his membership.

All of which is respectfully submitted,

Edward Osgoodby Jr.
For Defendant in Error

KNIGHTS OF PYTHIAS *v.* WITHERS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 170. Argued March 6, 1900. — Decided April 9, 1900.

By the rules of the beneficial or insurance branch of the Supreme Lodge Knights of Pythias, persons holding certificates of endowment or insurance were required to make their monthly payments to the Secretary of the subordinate section before the tenth day of each month ; and it was made the duty of the Secretary to forward such monthly payments at once to the Board of Control. If such dues were not received by the Board of Control on or before the last day of the month, all members of the section stood suspended and their certificates forfeited, with the right to regain their privileges if the amounts were paid within thirty days after the suspension of the section; provided, no deaths had occurred in the meantime. There was a further provision that the section should be responsible to the Board of Control for all moneys collected, and that the officers of the section should be regarded as the agents of the members, and not of the Board of Control. The insured made his payments promptly, but the Secretary of the section delayed the remittance to the Board of Control until the last day of the month, so that such remittance was not *received* until the fourth day of the following month. The insured in the meantime died. *Held:* That the Supreme Lodge having undertaken to

control the Secretary of the section by holding the section responsible for moneys collected, and requiring him to render an account and remit each month, — a matter over which the insured had no control,—he was thereby made the agent of the Supreme Lodge, and that the provision that he should be regarded as the agent of the insured was nugatory, and that the insured having made his payments promptly, his beneficiary was entitled to recover.

THIS was an action originally begun in the Circuit Court of Hale County, Alabama, by Josephine R. Withers, to recover of the defendant the amount of a certain certificate or policy of insurance upon the life of her husband.

The case was removed to the Circuit Court of the United States for the Middle District of Alabama, upon the petition of the defendant and upon the ground that the Supreme Lodge Knights of Pythias was a corporation organized by act of Congress, and hence that the controversy arose under the Constitution and laws of the United States.

The case was submitted to a jury upon an agreed statement of facts, and the court instructed a verdict for the plaintiff in the sum of three thousand dollars, the amount of the policy, with interest, upon which verdict a judgment was entered for $3392.54. The case was taken by writ of error to the Circuit Court of Appeals, which affirmed the judgment. 59 U. S. App. 177. Whereupon the defendant sued out a writ of error from this court.

The facts, so far as they are material, are stated in the opinion of the court.

Mr. Aldis B. Browne for plaintiff in error. *Mr. Alexander Britton* and *Mr. H. H. Field* were on his brief. *Mr. Thomas G. Jones* and *Mr. Charles P. Jones* filed a brief for same.

Mr. Edward De Graffenried for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court.

The Supreme Lodge Knights of Pythias is a fraternal and benevolent society, incorporated by an act of Congress of

June 29, 1894, 28 Stat. 96, as the successor of a former corporation of the same name, organized under an act approved May 5, 1870. The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those members of the order who have taken out benefit certificates. Such members are admitted into local subordinate branches known as Sections. The members of each Section elect their own president and secretary. The endowment rank is governed by a Board of Control whose officers are a president and secretary, and whose place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the Supreme Lodge, and by rules and regulations adopted by the Board of Control and approved by the Supreme Lodge.

On January 1, 1883, Robert W. Withers made application for membership in the endowment rank, and in that application made the following statement: "I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled by all the laws, rules and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." His application was accepted, and, after receiving a certificate under the first act of incorporation which he voluntarily surrendered, he received the certificate upon which this action is brought. This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were "made a part of this contract, . . . and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required, *and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws*, the sum of $3000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, . . . upon due notice and proof of death *and good standing in the rank at the time of his death*, . . . and it is understood and agreed that any violation of the within mentioned conditions or other

requirements of the laws *in force governing this right* shall render this certificate and all claims null and void, and the said Supreme Lodge shall not be liable for the above sum or any part thereof."

Withers was a member of Section 432, at Greensboro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank Withers was required to pay $4.90 monthly in accordance with his age and the amount of his endowment.

In January, 1894, defendant adopted and promulgated the following general laws:

"SEC. 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of Section without notice, on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title and interest such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the Board of Control, a new certificate shall be issued, and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

"SEC. 6. The secretary of the Section shall forward to the Board of Control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the Board of Control on or before the last day of the same month the Section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the Secretary of the Board of Control to the President and Secretary of such Section.

"Provided, that the Section whose membership has forfeited

their endowment, and whose warrant has been suspended, shall regain all right as a Section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said Section shall pay to the Board of Control the amount of all monthly payments, assessments and dues accrued upon said members."

"SEC. 10. Sections of Endowment Ranks shall be responsible and liable to the Board of Control for all moneys collected by the secretary or other officers from the members for monthly payments, assessments or dues not paid over to the Board within the time and manner prescribed by law. Officers of Sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the Board of Control or of the Endowment Rank or of the Supreme Lodge."

For over twelve years Withers made his monthly payments as required by law to the secretary of the Section, and the money was regularly remitted to the Board of Control at Chicago. His last payment was made prior to October 10, 1895, as required by section 4, for the dues of that month. As there were a large number of members in the Section, and as their dues were not all collected until the latter part of the month, the secretary of the Section did not send the money to the Board of Control until October 31, when he mailed to the secretary of that board a cheque covering all the amounts due by all the members of the Section for that month. The letter did not leave the post office until the next day, and was received by the Board of Control November 4. No notice was ever mailed by the Board of Control to Withers notifying him of his suspension; but on November first, as required by section six, the secretary of the Board of Control mailed to Mr. Chadwick, the secretary of the Section at Greensboro, a notice of the suspension of all members thereof, with an intimation that the members of the Section might regain their rights under certain conditions therein named. No notice was mailed to the President of the Section. In view of the technical character of the defence, it is worthy of mention that the Board of Control did not strictly comply with its own regulation in this particular.

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Upon receiving the remittance, and on November 4, the secretary of the Board of Control mailed the following postal card to the secretary of the Section: "Office Board of Control, Chicago, November 4, 1895. Received of Section No. 432 one hundred and thirteen 30–100 dollars in payment of monthly payments and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt. H. B. Stolte, Secretary Board of Control."

The insured was suddenly taken ill and died of an attack of cholera morbus on November 1, 1895. Proofs of death were waived by the defendant, which, however, refused to pay the amount of the certificate.

It is hardly necessary to say that the defence in this case is an extremely technical one, and does not commend itself to the average sense of justice. It ought to be made out with literal exactness. It is admitted that Withers for twelve years paid all his dues promptly to the secretary of the Section as required by section 4 of the general laws, and that the failure of the Board of Control to receive them on or before the last day of the month was the fault of the secretary, and not of the insured. The whole defence rests upon the final clause of section 10, declaring that "officers of Sections are the agents of the members and shall in nowise be considered as the agents of the representatives of the Board of Control of the endowment rank or of the Supreme Lodge." It appears to have been the habit of the secretary, Mr. Chadwick, not to remit each payment as it was made, but to allow all the dues of each month to collect in his hands and to remit them together by a cheque covering the whole amount, about the close of the month. In this connection he makes the following statement: "It had never been the custom of my office for me to send the money off by the twentieth of the month," (although section 6 required him to forward it immediately after the tenth.) "I usually sent the money off about the last days of the month. For the previous year I had mailed to the secretary of the Board of Control the dues of the Section as follows: October 27, 1894, November 28, 1894, December 29, 1894, January 29, 1895, February 27, 1895, March 30, 1895, April 29, 1895, June 29, 1895, July 8, 1895,

August 29, 1895, September 28, 1895, October 28, 1895, October 31, 1895—all of which sums were accepted by the Board of Control."

The position now taken by the defendant, that in receiving the money from the insured members, and remitting the same to the Board of Control, the secretary of the Section was the agent of the insured and not of the Board of Control, is inconsistent with the requirement of section 4, which makes it obligatory upon policyholders to pay their monthly dues to the secretary of the Section, and to him only, as well as with the provision of section 10, that "Sections of endowment rank shall be responsible and liable to the Board of Control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments or dues not paid over to the board within the time and manner prescribed by law." The question at once suggests itself to whom does the money belong when paid to the secretary of the Section? If to the insured, it was within his power to reclaim it at any time before it was remitted. If to the Board of Control, it was the duty of the secretary of the Section to remit it. Why, too, should the Board of Control attempt to deal with it at all beyond requiring it to be paid them by a certain day? Section 10 is a complete answer, since that makes the Sections responsible to the Board of Control from the moment the money is collected, and section 6 makes it the duty of the secretary to remit it at once.

There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so, if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less, that it would not be a good payment as of a certain day, though the

remittance, through the fault of the person receiving it, did not reach the creditor until the following day.

The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policyholders had absolutely no protection. They were bound to make their monthly payments to the secretary of the Section, who was bound to remit them to the Board of Control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction; and in case such remittance was not made within thirty days from such suspension (sec. 6) apparently to make it necessary under section 4 for each policyholder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days every member of the Section might lose his rights under his certificate and stand in the position of one making a new application, with a forfeiture of all premiums previously paid. The new certificate would, of course, be refused if his health in the meantime had deteriorated, and the examining physician refused to approve his application. This would enable the company at its will to relieve itself of the burdens of undesirable risks by refusing certificates of membership to all whose health had become impaired since the original certificate was taken out, though such certificate-holder may have been personally prompt in making his monthly payments.

It could not thus clothe the secretaries of the Sections with the powers of agents by authorizing them to receive monthly payments and instructing them to account for and remit them to

the Supreme Lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it," presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the Supreme Lodge, and his actions were, at least, as much for the convenience of the Lodge as for that of the insured. If the Supreme Lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority.

The reports are by no means barren of cases turning upon the proper construction of this so-called "agency clause," under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policyholder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy, conferring power and authority upon the agent, he is treated as the agent of the company rather than of the policyholder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs, to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained.

It was formerly held in New York in *Rohrbach* v. *Germania Fire Ins. Co.*, 62 N. Y. 47, and *Alexander* v. *Germania Fire Ins. Co.*, 66 N. Y. 464, that, where the insured had contracted that the person who had procured the insurance should be deemed his agent, he must abide by his agreement; and where

such person had, through fault or mistake, misstated in the application to the company the declarations of the assured, the latter must suffer for the error or wrong; but in a subsequent case, *Whited* v. *Germania Fire Ins. Co.*, 76 N. Y. 415, this doctrine was held to be limited to such acts as the agent performed in connection with the original application, and that in a renewal of the policy such party was treated as the agent of the defendant, for whose acts it was bound; and that it was within his power to make a valid waiver of the conditions of the policy. Said the court in its opinion: "That he was the agent of the defendant it would be fatuous to deny; were it not for a clause in the policy" (the agency clause) "upon which the defendant builds. . . . But if the insured is to be now bound as having thus contracted, there must be mutuality in the contract. No man can serve two masters. If the procurer of the insurance is to be deemed the agent of the insured . . . he may not be taken into the service of the insurer as its agent also; or if he is so taken, the insurer must be bound by his acts and words, when he stands in its place and moves and speaks as one having authority from it; and *pro hac vice*, at least, he does then rightfully put off his agency for the insured and put on that for the insurer. . . . Nor will it hold the plaintiff so strictly to the contract he made as to permit the defendant to ignore it and take his agent as its agent, and yet make him suffer for all the shortcomings of that person while acting between them and while under authority from the defendant to act for it." So in *Sprague* v. *Holland Purchase Ins. Co.*, 69 N. Y. 128, the insured signed a blank form of application, which was filled up by the company's agent without any knowledge or dictation of the insured. There were false statements therein, occasioned by the mistake or inadvertence of the agent. The policy contained the agency clause, as well as the condition that the application must be made out by the defendant's authorized agent, and it was held, using the language of the court in the *Whited case*, that the latter clause "swallowed down" the former, and that there was no warranty binding upon the plaintiff.

In *Patridge* v. *Commercial Fire Ins. Co.*, 17 Hun, 95, it was said of the agency clause: "This is a provision which deserves

the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president of the company should be deemed the agent of the assured. . . . Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. When a contract is, *in fact*, made through the agent of a party, the acts of that agent in that respect are binding on his principal."

In *Nassauer* v. *Susquehanna Ins. Co.*, 109 Penn. St. 507, 509, under a by-law providing that "in all cases the person forwarding applications shall be deemed the agent of the applicant," it was held, under the circumstances of the case, that the agent of the company soliciting insurance was not the agent of the applicant, and that such by-law was not binding upon him. Although the insured is supposed to know at his peril the conditions of the policy, that will not bind him to a provision which is not true, and one which the company had no right to insert therein. "We do not assent," said the court, "to the proposition that the offer" (that the agent made his own valuation of the property) "was incompetent, because Laubach was the agent of the assured in filling up the application and forwarding it to the company. He was not the agent of the assured. The latter had not employed him for any purpose. He was the agent of the defendant company, and as such called upon the assured and solicited a policy, and having obtained his consent, proceeded to fill up the application for him to sign. As to all these preliminary matters the person soliciting the insurance is the agent of the company." The court, speaking of the agency clause, observed: "This court, in the case above cited, *Columbia Ins. Co.* v. *Cooper*, 50 Penn. St. 331, characterized a somewhat similar provision as a 'cunning condition.' The court might have gone further and designated it as a dishonest condition. It was the assertion of a falsehood, and an attempt to put that falsehood into the mouth of the assured. It formed no part of the contract of insurance. That contract consists of the application and the policy issued in pursuance thereof. In point of

fact the assured does not see the policy until after it is executed and delivered to him. In many instances it is laid away by him and never read, especially as to the elaborate conditions in fine print. Grant that it is his duty to read it, his neglect to do so can bind him only for what the company had a right to insert therein. He was not bound to suppose that the company would falsely assert, either by direct language in the policy or by reference to a by-law, that a man was his agent who had never been his agent, but who was on the contrary the agent of the company. Notwithstanding this was a mutual company, the assured did not become a member thereof until after the insurance was effected. Hence a by-law of the company of which he had no knowledge, and by which he was bound, could not affect him in matters occurring before the granting of the policy. And even a by-law of a mutual company which declares that black is white does not necessarily make it so." Similar cases are those of *Eilenberger* v. *Protective Ins. Co.*, 89 Penn. St. 464; *Susquehanna &c., Ins. Co.* v. *Cusick*, 109 Penn. St. 157; and *Kister* v. *Lebanon Ins. Co.*, 128 Penn. St. 553.

The case of *Lycoming &c., Ins. Co.* v. *Ward*, 90 Illinois, 545, resembles the case under consideration. In that case it was held that, where the assured contracts with one as the agent of the insurer, believing him to be such, and does not employ such supposed agent to act for him in obtaining insurance, such person has no power to act for or bind the insured, though the policy may provide that the person procuring the insurance shall be deemed the agent of the insured, and not of the company. Plaintiff paid the premium to the person with whom she contracted for the insurance, and of whom she obtained the policy. It was held that such person, assuming to be the agent of the company, the payment was binding upon the company, whether he paid the money over or not. In that case the person to whom the money was paid was not in reality an agent of the company, although plaintiff believed him to be such, but only a street insurance broker, who represented himself to be the agent of the company. Said the court: "Under such circumstances who should bear the loss arising from the fraud committed by the street broker? Should it fall upon the plaintiff, who was

an innocent party in the transaction, or should it fall upon the company, who alone enabled Puschman to successfully consummate the contract of insurance by placing in his hands the policy for delivery? The street broker was not the agent of the plaintiff for any purpose. If the evidence be true, he had no authority to act for her or bind her in any manner whatever by what he might do in the premises, and while he may not have been, in fact, the agent of the company, still the company, by placing the policy in the hands of the street broker for delivery, is estopped from claiming that the payment made to him upon delivery of the policy is not binding upon the company."

In Indiana it is also held that a recital in the policy that the broker obtaining an insurance is the agent of the insured is not conclusive upon that subject. *Indiana Ins. Co.* v. *Hartwell*, 100 Indiana, 566. In *North British &c., Ins. Co.* v. *Crutchfield*, 108 Indiana, 518, the agency clause was held to be absolutely void as applied to a local agent, upon whose counter signature the validity of the policy, by its terms, was made to depend.

In *Boetcher* v. *Hawkeye Ins. Co.*, 47 Iowa, 253, it was held that, if the assured had the right to believe the soliciting agent was the agent of the company, the insertion of a clause in the policy providing that he was the agent of the assured constituted a fraud upon the latter, of which the company could not take advantage.

Speaking of the agency clause in *Continental Ins. Co.* v. *Pearce*, 39 Kansas, 396, 401, it is said: "This is but a form of words to attempt to create on paper an agency, which in fact never existed. It is an attempt of the company, not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed. We do not believe the entire nature and order of this well established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an

unreal authority." See also *Kausal* v. *Minnesota &c., Ins. Asso.*, 31 Minnesota, 17, in which the act of an insurance agent in making out an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy.

In *Planters' &c., Ins. Co.* v. *Myers*, 55 Mississippi, 479, 498, 506, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. Speaking of the agency clause, it is said: "The verbiage of this condition is not candid; it seems to have been used with studied design to obscure the real purpose. It is a snare, set in an obscure place, well calculated to escape notice. It is not written or printed on the face of the policy. It is not so much as alluded to in the application; nor is the agent in his printed instructions enjoined to inform those with whom he treats of it. . . . Its inevitable effect is to greatly weaken the indemnity on which the assured relied. It is inconsistent with the acts and conduct of the insurance companies in sending abroad all over the land their agents and representatives to canvass for risks. It is an effort by covenant to get the benefits and profits which these agents bring them, and at the same time repudiate the relation they sustain to them; and to set up that relationship with the assured, and that, too, without their knowledge and consent. It is not a limitation or restriction of power, but the dissolution of the relationship with themselves and the establishment of it between other parties."

The case of *Schunck* v. *Gegenseitiger Wittwen und Waisen Fond*, 44 Wisconsin, 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several "groves," (corresponding to the sections in this case,) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made, forfeited his claim to have a certain sum in the nature of life insurance paid to his widow, or heirs,

after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are, at least, as much its agents to collect and pay over the dues of their members, as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death, the amount of insurance might be recovered, notwithstanding a default of the grove in paying over such dues to the defendant.

The agency clause was also once before this court in the case of *Grace* v. *American Central Ins. Co.*, 109 U. S. 278, in which a clause in the policy that the person procuring the insurance to be taken should be deemed the agent of the assured and not of the company, was held to import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

In the following cases the officers of the subordinate lodge, or conclave, were treated as the agents of the Supreme Conclave in the matter of granting extensions of time for the payment of assessments: *Whiteside* v. *Supreme Conclave*, 82 Fed. Rep. 275; *Knights of Pythias* v. *Bridges*, 39 S. W. Rep. (Tex.) 333.

In the case under consideration it may be immaterial, except as bearing upon the equities of the case, that the agency clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to Withers' attention, or that he had actual knowledge of it. If he were bound at all, it could only be by the stipulation in his original application, and by the terms of his certificate that "he would be bound by the rules and regulations of the order, now in force or that may hereafter be enacted." All that is required of him is a full compliance with such laws, and there is not the slightest evidence that he failed

personally in any particular to comply with any laws of the order, present or future. The only failure was that of the secretary of the Section, who, to say the least, was as much the agent of the order as he was of Withers, although the latter is sought to be charged with his dereliction by a clause inserted in the general laws, long after the certificate was issued. The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the Board of Control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power of declaring that the default of Chadwick, by so much as one day, (and it did not exceed four days in this case,) to pay over this money, should cause a forfeiture of every certificate within his jurisdiction, is a practical injustice too gross to be tolerated.

Without indorsing everything that is said in the cases above cited, we should be running counter to an overwhelming weight of authority, were we to hold that the agency clause should be given full effect regardless of other clauses in the certificate or the by-laws, indicative of an intention to make the officers of subordinate lodges agents of the supreme or central authority. We should rather seek to avoid as far as possible any injustice arising from a too literal interpretation, and only give the clause such effect as is consistent with the other by-laws and with the manifest equities of the case. We are, therefore, of opinion that in this case the secretary of the Section was in reality the agent of the Supreme Lodge from the time he received the monthly payments, and that the insured was not responsible for his failure to remit immediately after the tenth of the month.

We have not overlooked in this connection the case of *Camp-*

bell v. *Knights of Pythias*, 168 Mass. 397, in which a different conclusion was reached upon a similar state of facts. In that case plaintiff put his right to recover upon the theory that the mailing of the remittance was a compliance with the requirement of section six that such payments and dues should be *received* on or before the last day of the month. This position was held by the court to be untenable. It was said that the money must have been actually *received* at the office of the Board of Control before the end of the month. The question of agency was not considered, and the trend of the argument is so different that the case cannot be considered an authority upon the propositions here discussed. The cases of *Peet* v. *Knights of Maccabees*, 83 Michigan, 92, and *McClure* v. *Supreme Lodge*, 59 N. Y. Sup. 764, are not in point.

The judgments of the Circuit Court and of the Court of Appeals were right, and they are therefore

Affirmed.